S. HRG. 99-824

OVERSIGHT OF DISTRICT OF COLUMBIA COURTS

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY AND THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

MARCH 5, 1986

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OVERSIGHT OF DISTRICT OF COLUMBIA COURTS

WEDNESDAY, MARCH 5, 1986

U.S. SENATE,
SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

OPENING STATEMENT OF SENATOR MATHIAS

Senator MATHIAS. The committee will come to order.

Today, the Subcommittee on Governmental Efficiency and the District of Columbia meets to consider several legislative proposals to improve the operation and efficiency of the courts in the city of Washington.

In 1970, the Senate District Committee—the predecessor of this subcommittee—undertook a major effort to reorganize the courts of Washington. The principal purpose of that activity was to improve the administration of justice in the city.

The resulting District of Columbia Court Reform and Criminal Procedural Act of 1970 established the superior court, restructured the District of Columbia Court of Appeals, and was intended to put the city court system on a level comparable with that of State and local court systems throughout the country.

After several years of experience, the District of Columbia Bar asked Mr. Charles A. Horsky, a distinguished member of the bar with unusual experience both in private practice and in Government, to undertake a study of the District of Columbia court system and to establish a committee for that purpose.

The committee's mission was to assess the effect of the Court Reform Act and to make recommendations as warranted for further improvement in the local court system.

Four years later, after extensive work by a number of dedicated citizens—46 to be precise—the committee issued its study which was printed by the Committee on Governmental Affairs for its own use and made available to interested parties.

Today, we will hear witnesses who will testify on two legislative proposals which are, in a large measure, the results of the work of the Horsky committee.

In addition, the Chief Judge of the District of Columbia Court of Appeals will, I believe, address a number of issues which the Joint Committee on Judicial Administration for the district courts has included in a legislative package.

I will put into the record copies of the two bills that we have before us, the House of Representative bill 3578, the Judicial Efficiency and Improvement bill, and House of Representatives bill 2946, the District of Columbia Jury System bill.

In 1970, when the Court Reform Act was adopted, my colleague on this subcommittee and I were the junior members of the District Committee. Today, as we both prepare to turn over the responsibility of the committee to new hands, we are pleased to be able to, once again, welcome many distinguished members of the local community, including the Chief Judges of both the District of Columbia Court of Appeals and the superior court.

I have already delayed your schedules by a few minutes this morning, for which I apologize, due to a previous meeting that I had to attend. I will desist from any further statement at this time, other than to put Senator Eagleton's opening remarks in the record—since he has been called away—along with the two copies of the bills previously mentioned.[1]

OPENING STATEMENT OF SENATOR THOMAS F. EAGLETON

Mr. Chairman, I am pleased that today the Subcommittee has the opportunity to hear testimony on two bills to make important reforms in the District of Columbia court system.

We have come a long way from the acrimonious debate that accompanied passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970. Court reform was the centerpiece of that Act, and the record shows that a unified local court system has served the citizens of the District well.

I am particularly pleased that the initiative for these bills comes from the community. H.R. 3578, the Judicial Efficiency and Improvement Act, for instance, is a distillation of the work of the D.C. Court System Study Committee (the Horsky Committee), which conducted a major, four-year study of the effects of the 1970 court reform act. The Horsky Committee's work was further refined by an *ad hoc* committee of the D.C. Bar chaired by John Pickering. The bill makes much needed improvements in the court system by providing permanent authority for hearing commissioners, providing authority for the D.C. Court of Appeals to decide questions of D.C. law certified to it by other courts, eliminating the role of the Administrative Office of the U.S. Courts in choosing the Executive Officer of the local courts, and modifying several aspects of the judicial nomination, reappointment and tenure process.

Similarly, the jury system reform bill, H.R. 2946, was inspired by proposals made by the Board of Judges, the D.C. Bar, the Council for Court Excellence and other members of the community for an independent and more efficient jury system for the local courts. Providing for such a system is one of the last steps that needs to be taken to complete the process begun by the 1970 Act. Statutory authority for an independent D.C. jury system will also facilitate implementation of the Court's plan for a one day, one trial system for the local courts.

I look forward to reviewing the testimony of today's witnesses.

Senator MATHIAS. We will proceed then, judge, with your testimony. I might say that it is, once again, a pleasure and an honor for the committee to have the judges with us today. We appreciate their attendance. I know that coming here impinges on your own schedules, which makes your testimony all the more valuable.

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[1] The two bills referred to will be found on p. 139 and p. 156.

TESTIMONY OF CHIEF JUDGE WILLIAM C. PRYOR, DISTRICT OF COLUMBIA COURT OF APPEALS

Judge PRYOR. Good morning. I am William Pryor. I thank you for the opportunity to be here. As you know, Judge Moultrie and I share the major responsibilities for the administration of the court, and I will talk about some items and Judge Moultrie will do likewise.

I would like to begin, having submitted a copy of the prepared statement to you, with just a few highlights, the first of which would be sabbatical leave.

Senator MATHIAS. If I could interrupt you, judge, let me direct the court reporter at this point that all the prepared statements will be included in the record so that then you are free to make such further comments as you like.

Judge PRYOR. Thank you.

Sabbatical leave is a subject which we have given considerable thought on the Joint Committee and on the court at large.

As you know, we have had a number of judges retire, and one of the primary reasons has been that—to use a readily identifiable phrase—they seem a little "burnt-out." As a result, we have looked more closely at what sabbatical leave might do for the court system. In short, we propose that we establish a system of sabbatical leave with certain guidelines. In the main, a judge would have to serve for 10 years to be eligible and the sabbatical leave could not exceed 12 months. We would set up additional criteria. The Joint Committee of the court system would refine and limit the use of sabbatical leave to sensible and reasonable uses by the judges.

So, I would say very generally then, that sabbatical leave, I think, would help the court system. It is a healthy addition to how we presently operate, and we urge it.

With regard to compensation, looking first at our retired judges, if I may, I would like to point out that presently retired judges reach that point—retirement—with various and different stages of financial background, that is to say, some come to the court with a lot of Government experience; others come with predominant private practice experience.

Their retirements are calculated accordingly, thus, when they work as retired judges, they presently get the difference between their retired pay and that which is the actual current pay for an active judge.

What that means, quite simply, is that each retired judge is paid differently.

What we suggest is that all retired judges who continue to work be paid the same, subject to the level or the ceiling of the maximum pay for a current judge. We think this will make matters simpler. It will compensate retired judges for what they do, and we think there is enough natural interest that the judges will continue to work as they do now.

Generally speaking on compensation generally, I am not sure that I want to simply compare our court to the Federal system, but presently we are paid at the rate of 90 percent of the Federal compensation.

For a number of reasons, we urge that this be changed. Basically—and speaking modestly—we feel our work is at least equally as important, equally as demanding, and requires just as much of our court judges as does the Federal system.

We are under continuing and healthy scrutiny by a couple of commissions: Selection and Tenure Commissions. We generally look to the same bar, that is, the District of Columbia Bar, for people to serve on the bench and, thus, it would seem, as a matter of common sense, that there really is not a substantial and prevailing reason to have this 90-percent differential which presently exists. Indeed, we are prepared to talk more about the Consumer Price Index as that affects compensation, but suffice it to say here, we would urge a change.

With regard to the way judges are presently evaluated, as you know, there are four systems, four criteria or four ratings, to be more exact. One of those is exceptionally well qualified; another is well qualified; a third is qualified; and a fourth is unqualified.

The question is whether we need those four ratings, and after considerable thought, particularly from the point of view of a sitting judge, we would urge that the exceptionally well-qualified rating be deleted. I was thinking about this at length, and, I guess, my basic thought about it is this. If the purpose of these ratings is to help us deal with tenure and to decide whether a judge should be reappointed, then the three ratings will suffice.

There is the point of view that this is the way to recognize exceptional work by a judge, and that is true. The downside of it is, however, that from the point of view of judges it is a serious question as to whether we wish to inject something which tends to stimulate competition and rivalry amongst judges.

If we were salespeople, that might be appropriate. It happens to be my point of view that, for a bench, we are more interested in cohesiveness and working together and less interested in competition.

I think the purpose of judicial selection is enhanced by the three criteria. I am very uncertain that we further the purposes of tenure or the like by having four factors. Indeed, it seems to me from the point of view of a judge that it simply is a divisive factor, one, I might point out, that is not found in the Federal system.

Two other matters just to pass by lightly. Our court executive: we would urge, with the exception of the person who is incumbent, that in the future our court executive be a resident of the District of Columbia. We think that is in keeping with the whole scheme of the rest of the court procedures and selection, and we think that position should be accorded the same treatment.

With regard to the court of appeals in particular, there is the question of certification of legal questions from other State courts or Federal courts on a question which has been undecided in this jurisdiction. We think that is a good provision, a healthy provision and, therefore, urge that it be incorporated into new legislation.

I think there is one other subject, but it escapes me now—oh, yes, financial disclosure.

Senator MATHIAS. There is always financial disclosure.

Judge PRYOR. Presently we report to two bodies, a Federal body and the local commission. We simply urge, in keeping with other

recommendations coming from such people as the late Judge Tamm, that our local judges simply report to the local commission.

Thank you, Sir.

Senator MATHIAS. Thank you very much, Judge Pryor.

Without objection, your written remarks will be made a part of the record at this point.

[Judge Pryor's prepared statement, with attachments, follow:]

Testimony of Chief Judge William C. Pryor
District of Columbia Court of Appeals
before the
Senate Subcommittee on Governmental Efficiency
and the
District of Columbia

March 5, 1986

Chairman Mathias and members of the Subcommittee on Governmental Efficiency and the District of Columbia, it is my pleasure to testify before you today in my capacity as Chairman of the Joint Committee on Judicial Administration for the District of Columbia Courts (Joint Committee). Last year, the Joint Committee developed a legislative package, outlining changes that are needed to strengthen the District of Columbia court system. I speak to you today to articulate the basis for these proposed changes, and to solicit your support for their implementation. In my remarks, I will discuss those elements of our legislative package that have an impact on the court system as a whole. I will also note those proposals that have been incorporated into House Bill H.R. 3578, "The District of Columbia Judicial Efficiency and Improvement Act of 1985" (Judicial Improvement Act). Chief Judge H. Carl Moultrie I, in his testimony, will address those proposals that pertain solely to the operation of the Superior Court.

Several of our proposals relate to active judges. First, we urge adoption of legislative changes that would allow judges of the District of Columbia Court of Appeals and Superior Court of the District of Columbia to be com-

pensated at a level commensurate with federal appellate and trial judges, respectively. A more detailed discussion of this proposal is attached to this statement as Appendix "A".

We have also proposed implementation of a policy that would provide for a system of sabbatical leave for judges on the District of Columbia Courts. Judges on both the Court of Appeals and Superior Court are appointed for 15 year terms. The work of a judge, involving long hours, enormous responsibility, and unvarying routine, is highly stressful. Our proposal would counter this stress, and thus enhance judicial performance and job satisfaction, by authorizing a sabbatical leave of up to twelve months following a minimum of ten years of service on the bench. Such leave would be taken in a setting separate from the normal workplace, and providing an opportunity for individual enrichment. Under our proposal, the eligibility criteria for participation in the sabbatical program would be established by the Joint Committee. These criteria would preclude a judge from taking a sabbatical during the final year of a term.

Further, we endorse a change in current legislation which requires District of Columbia Judges to file financial disclosure statements with both the Judicial Ethics Committee of the Judicial Conference of the United States (Judicial Ethics Committee) and the District of Columbia Commission on Judicial Disabilities and Tenure (D.C. Judicial Tenure Commission). In our view, the current

scheme is needlessly duplicative. Under our proposal, which is incorporated in Section 8 of the proposed Judicial Improvement Act, judges would be required to file financial disclosure reports only with the D.C. Judicial Tenure Commission. Significantly, the late Judge Tamm supported such a change when he was Chairman of the Judicial Ethics Committee. A newspaper article, detailing Judge Tamm's support for this change in disclosure requirements, is attached to this statement as Appendix "B".

Next, we request a change in the system used to rate active judges seeking reappointment. Under the current legislative scheme, judges seeking reappointment are rated according to four categories: "exceptionally well qualified," "well qualified," "qualified," and "not qualified." Our experience indicates that the "exceptionally well qualified" category adds little to the rating scheme, and can provoke unnecessary consternation. Thus, we propose elimination of the "exceptionally well qualified" distinction in our current rating system.

Our package also contains proposals addressing important concerns relating to the appointment, compensation, and certification of our retired judges. Currently, a retired judge may seek appointment as a senior judge only during the 180 day period following retirement. If such appointment is not requested during this six-month period, a retired judge is barred by statute from ever serving the court as a senior

judge. Our proposal, incorporated in Section 16 of the Judicial Improvement Act, would permit a retired judge to seek appointment as a senior judge at any time before or after retirement. We believe this change would add important flexibility, while not violating the purposes of the 1984 legislation which imposed the restriction.

Next, we strongly urge adoption of a more equitable approach to compensating retired judges for their service to the District of Columbia Courts. Under the current compensation scheme, senior judges are paid for their services at a daily rate calculated as the difference between their annual retirement salary and the annual salary of an active judge on the same court. Because the annual retirement salaries of senior judges differ significantly, wide discrepancies exist in the amount of pay these judges receive for a day of service to the court. Moreover, the daily remuneration of some judges under this system is very low.

Because we believe the current system of compensation for senior judges to be unfair, we have proposed that these judges be paid for work performed at a daily rate equal to that received by active judges on the same court. To prevent a senior judge from receiving annual compensation in excess of an active judge, however, our proposal provides that the aggregate of retirement benefits and cumulative daily earnings of a senior judge could not exceed the current annual salary of an active judge.

Finally, we have suggested changes in the certification procedure for senior judges implemented by Congress in P.L. 98-598. These changes are discussed in our letter to the Committee of September 16, 1985, which is attached to this statement as Appendix "C".

Our proposals also include suggested changes to the certification and residency requirements for the Executive Officer of the District of Columbia Courts (Executive Officer). Under existing legislation, candidates for the job of Executive Officer must be certified by the Administrative Office of the United States Courts (U.S. Administrative Office). Because current operating procedures provide for no interaction between the U.S. Administrative Office and our court system, we propose that this certification requirement be eliminated. Under our proposal, which is contained in Section 4 of the Judicial Improvement Act, the Executive Officer would be selected and retained by the Joint Committee, with the approval of the Chief Judges of the Court of Appeals and Superior Court.

Section 4 of the proposed Judicial Improvement Act also requires that the Executive Officer become a bona fide resident of the District of Columbia within 180 days after appointment. While we support this proposal, we request that the current Executive Officer be exempted from this residency requirement. Such an exception would be consistent with the manner in which the residency requirement was

first applied to judges in the District of Columbia in 1973. At that time, the residency requirement was applied prospectively only, thus limiting its impact to newly appointed judges of the District of Columbia Courts.

Finally, we would like to endorse a proposal not contained in our original legislative package. Section 9 of the proposed Judicial Improvement Act authorizes federal courts and other state courts to certify questions of District of Columbia law to the District of Columbia Court of Appeals where no controlling precedent exists. This legislation is, in our view, commendable as it would permit District of Columbia law as interpreted by our highest court to be consistently applied throughout the country.

Thank you for the opportunity to speak to you on our court system's pressing legislative needs. We urge your support for our proposals, and look forward to working with you and your staff on their implementation. I am confident that together, we can make changes that will improve the District of Columbia court system.

APPENDIX A

JUDICIAL SALARIES

The case for increased judicial salaries has been made many times and by many people at both state and federal levels. Attraction to and retention on the bench of judges (both trial and appellate), failure of judicial salaries to keep pace with such financial indicators as the Consumer Price Index, federal and local government salary increases, and federal retiree cost-of-living increases are some of the more recent, and convincing, arguments. These arguments are made even stronger, however, when one considers that the salaries of the District of Columbia judges are legislated to be at only 90% of their counterparts in the federal courts.

Many proponents of higher judicial salaries, such as the American Bar Association, have publicly stated that federal judges' salaries are much too low, considering the increasing workloads of both appellate and trial courts and the marketability of a lawyer's skill in the private sector. Moreover, federal judicial salaries are uniform across the nation without adjustment for cost-of-living factors peculiar to the various geographic regions. Federal judges residing in high cost-of-living areas such as Washington, D.C., San Francisco, Chicago, and New York, unquestionably have less net spendable income and less buying power than those federal judges living in low cost-of-living areas and earning at the exact same salary level. In the high cost-of-living areas mentioned above, with only one minor exception, state court judges' salaries are comparable to or exceed federal judges' salaries. Yet in the District of Columbia, our Court of Appeals and Superior Court judges are compensated, statutorily, at only 90% of the federal judicial salary.

This inequity can be illustrated in various ways. The federal courts in the District of Columbia and the District of Columbia Courts, both must attract candidates from a similar pool of legal talent. The qualifications, competence and legal skills demanded by both the federal and local courts are comparable, yet the task of the local judge is more demanding in terms of caseload volume and workload. Moreover, District of Columbia judges are required to live in the District, where the cost-of-living, housing and tax rate is much higher than the surrounding metropolitan areas where judges of the United States Court of Appeals and District Court for the District of Columbia may choose to live. The life tenure and lifetime full salary of a federal judge when compared to the 15 year fixed term and reduced retirement benefits available to a District of Columbia judge, devaluate a local judge's compensation even more. This is further exacerbated by the fact that the D.C. Courts, with functions and levels of operation tantamount to a state-wide court system, manage by far a larger and more varied caseload. One must also focus on the fact that the major duties of D.C. Courts' judges are those which, prior to 1972, were the duties of the federal judges in the District of Columbia, and were those duties which were transferred as a result of the Court Reorganization Act of 1970.

The quality of the judges in the District of Columbia is excellent but it is clear that they are not a cross section of the District of Columbia Bar. The Bar consists, primarily, of private practitioners, while our judges come to us predominantly from public service. This may reflect a preference in these individuals for continued public service, but one must also consider whether it is a reflection of the private bar's reluctance to leave private practice for the long hours and limited income of the position, notwithstanding the prestige of becoming a judge.

At one time the acceptance of a judicial appointment was considered by an aspirant as the pinnacle of a legal career. The change in perspective, however, may be illustrated by the fact that our most experienced judges continue to retire long before they reach the mandatory retirement age, to return to active pursuits, all of which points to the fact that low judicial salaries in the District of Columbia have a substantial effect upon the makeup of our courts and the experience level of our judges.

There are a number of independent barometers and indicators which may be cited as viable measures of income in relation to the broader economic picture. Three appropriate and standard gauges by which to evaluate the course of salary development for judges of the D.C. Courts are: 1) the "Consumer Price Index"; 2) salary increases for federal government employees; and, 3) cost-of-living adjustments for federal retirees. Had judicial salaries been augmented in correlation with any one of these steadily rising scales just since 1977, the incomes of judges of the Superior Court would have been 22%, 7% or 21% greater, respectively, than they actually are in 1986. (See attached charts).

To better clarify and focus perspective on the relevance of locale as it relates to income, it is important to apply a variety of available and independent tools. For example, the General Services Administration prepared and released a survey in July 1983 entitled, "Interim Investigation of Average Daily Subsistence Costs for Selected Localities Within the Conterminous United States." At a per diem rate of $148.60, Washington, D.C. was second only to Manhattan ($164.35) and considerably ahead of other cities commonly reputed to be "expensive": San Francisco ($126.95), Los Angeles ($125.10), Chicago ($121.75), New York City - Other than Manhattan ($114.25), Hilton Head

($112.25), Dallas/Fort Worth ($110.60), and Detroit ($94.05). There is a certain irony in the fact that the range of state judicial salaries for these expensive localities, general trial court to highest court, is higher than that provided for the District of Columbia Courts (see Table below).

State Judicial Salaries (as of July 1, 1985)

"State"	Highest Court	General Trial Court
1. California	$94,147	$77,129
2. New York	$92,500	$82,000
3. Illinois	$85,000	$73,000
4. Texas	$78,795	$76,795
5. Michigan	$77,700	$71,484
6. South Carolina	$76,773	$72,935
7. District of Columbia	$74,880	$70,830

(Source: Based on table prepared by the Research and Information Service of the National Center for State Courts, Williamsburg, Va., November 1985.)

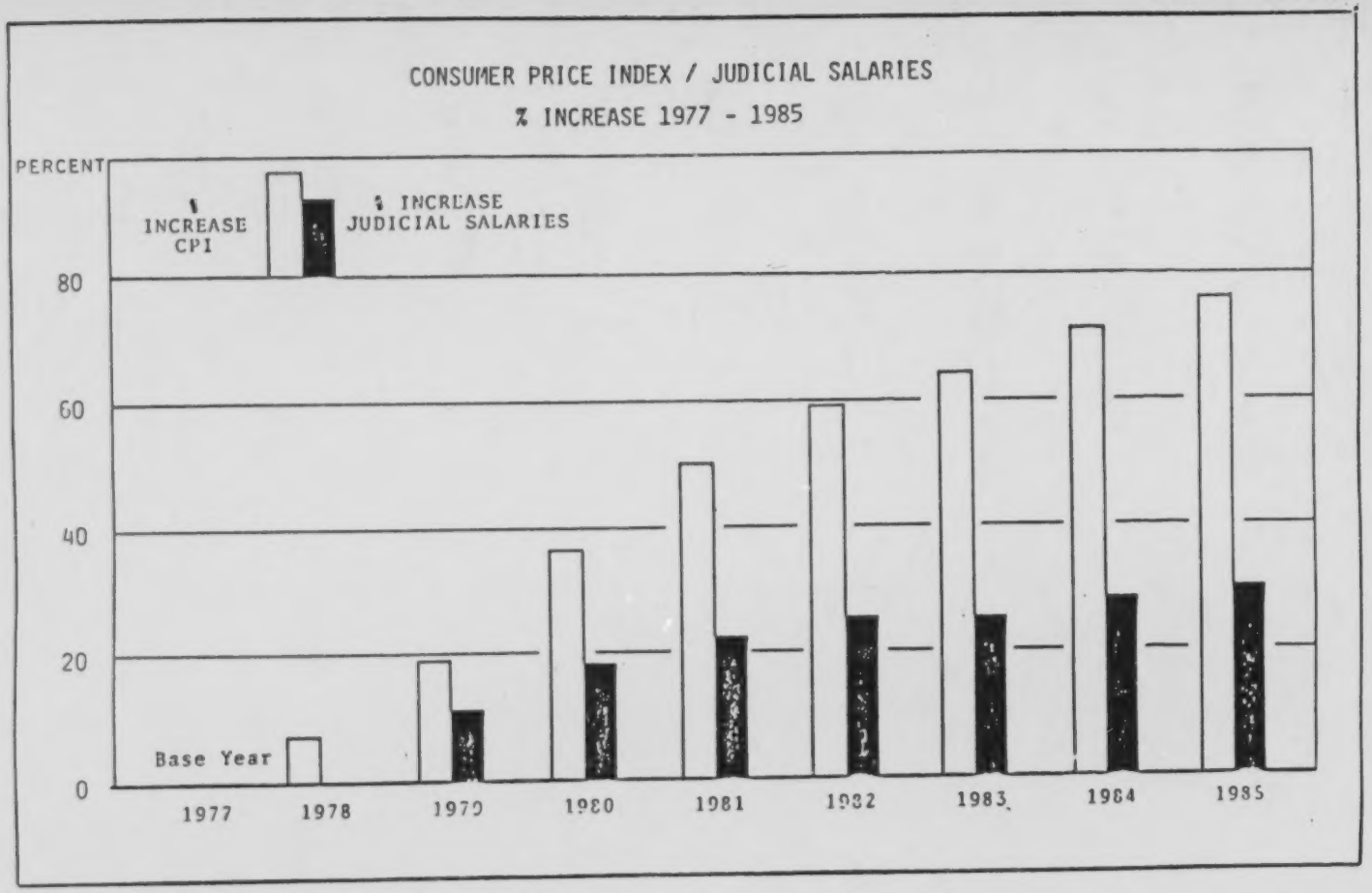
Another factor that can be weighed in this equation is the price of an average single-family home. Drawing upon data furnished by the U.S. Bureau of the Census and the National Association of Realtors, the Places Rated Almanac, 1981 edition (published by Rand McNally and Company), reports that of these seven jurisdictions, the Washington, D.C. area is the most expensive in terms of housing ($94,348), with the exception of two California cities (San Francisco - $127,478, Los Angeles - $113,985).

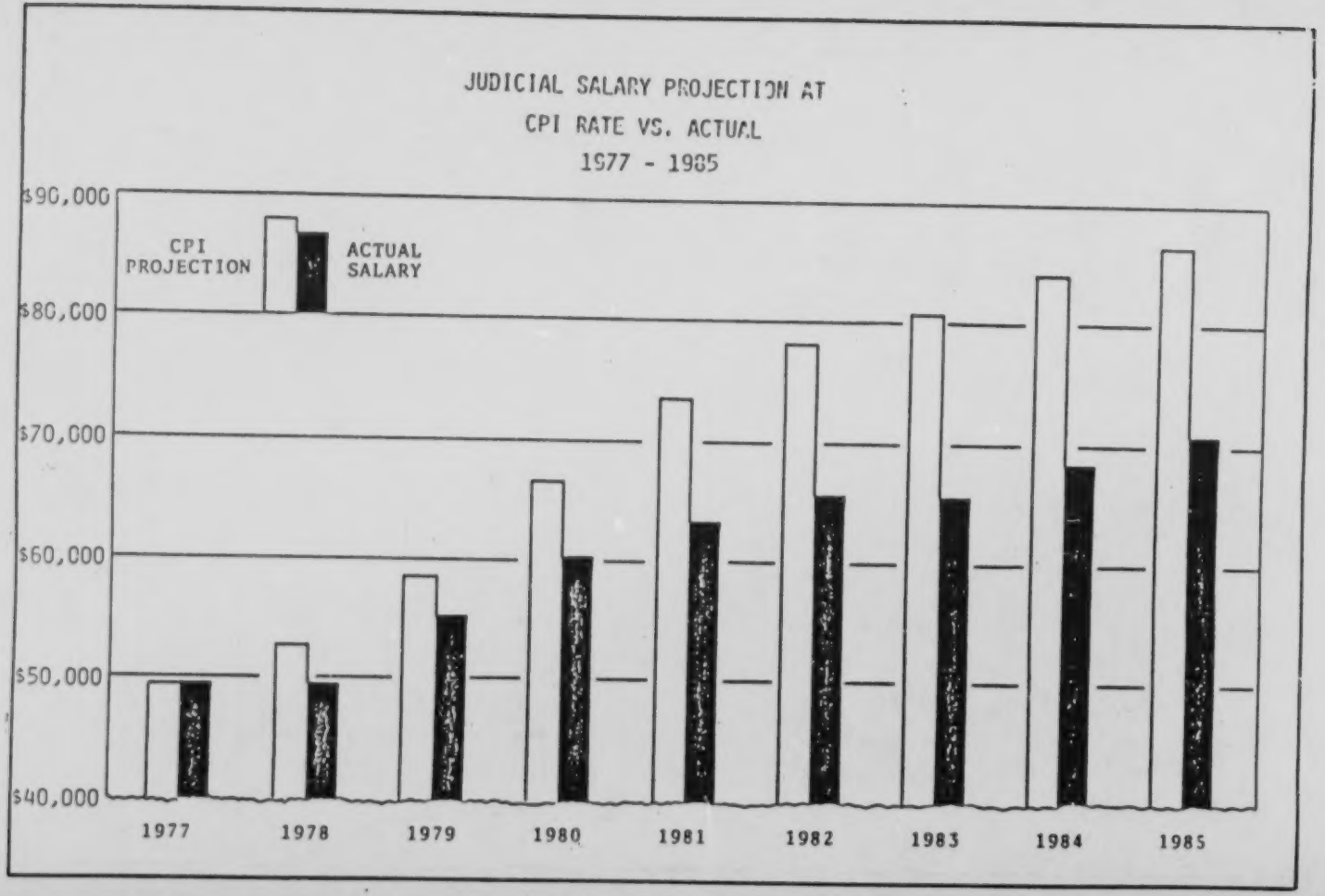
A look at the structure, salary and grade levels of District of Columbia government employees as compared to the federal government employees indicates that local government pay scales and grade levels for comparable positions are at equal or comparable levels. Why should judicial salaries be singled out as the only situation where local positions are not only not

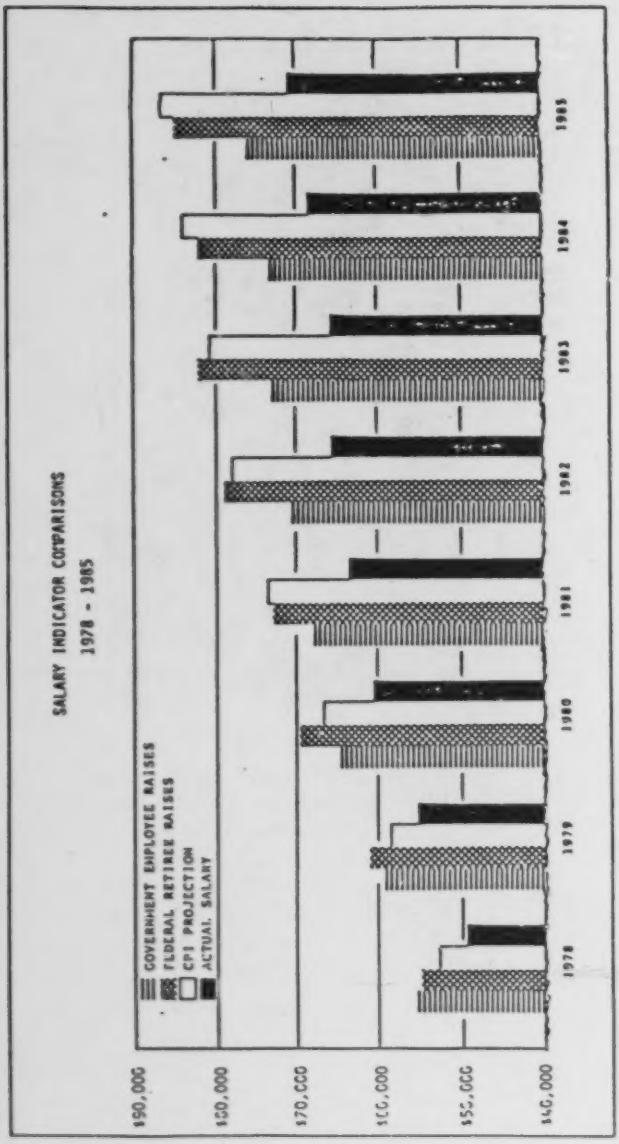
comparable but at a 10% variance. We submit that the rationale in 1970 which may have made sense when the Congress was establishing a fledgling court system and trying to determine the salary level of its judges, does not apply today considering the volume, complexity and status of the D.C. Court System which needs to attract and retain as high a quality bench as any state or federal court in the nation.

Adequate investment in a first class Third Branch is not to be taken lightly nor overlooked. There is no reason to expect that, in the long run, a public servant's sense of altruism and dedication to duty will overshadow the need to provide, to the best of one's ability, for family and for self.

In sum, the judges of the District of Columbia courts should receive a fair rate of compensation compared to federal judges and their counterpart judges in other urban, high cost of living cities and states.


CONSUMER PRICE INDEX / JUDICIAL SALARIES
% INCREASE 1977 - 1985
PERCENT
% INCREASE CPI
% INCREASE JUDICIAL SALARIES
80
60
40
20
0
Base Year
1977
1978
1979
1980
1981
1982
1983
1984
1985


JUDICIAL SALARY PROJECTION AT
CPI RATE VS. ACTUAL
1977 - 1985
$90,000
$80,000
$70,000
$60,000
$50,000
$40,000
CPI PROJECTION
ACTUAL SALARY
1977
1978
1979
1980
1981
1982
1983
1984
1985


SALARY INDICATOR COMPARISONS
1978 - 1985
GOVERNMENT EMPLOYEE RAISES
FEDERAL RETIREE RAISES
CPI PROJECTION
ACTUAL SALARY
190,000
180,000
170,000
160,000
150,000
140,000
1978
1979
1980
1981
1982
1983
1984
1985

BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 16
NUMBER 7
JULY 1984

Judge Edward A. Tamm: The Role of The Committee on Judicial Ethics

Judge Edward A. Tamm has been on the federal bench for thirty-five years. He was appointed to the District Court for the District of Columbia in 1948 and to the Court of Appeals for the District of Columbia Circuit in 1965. Judge Tamm graduated from Georgetown Law School in 1930 and joined the FBI the same year, where he served until his appointment to the bench.

In 1978, Judge Tamm was named the first chairman of the Judicial Conference's Committee on Judicial Ethics, which was formed pursuant to the Ethics in Government Act of 1978, 28 U.S.C. app. § 301 et seq. (1982). In this interview Judge Tamm explains how and why the ethics committee collects financial information from members of the judiciary, who receives that information, who reviews it, who may see it, and what happens if the information provided is incomplete or raises questions.

Judge Edward A. Tamm

What is the scope of the work encompassed by the Judicial Conference Committee on Judicial Ethics?

The scope of the work of the committee on ethics is prescribed by the statute. We are required by the statute to develop the necessary forms and promulgate such rules and regulations as may be necessary; and the most important thing, I think, is set out in the statute—to "monitor and investigate compliance with the requirements of the judicial ethics statute."

What responsibilities were assigned to the Judicial Review Committee?

The review committee was a committee established by Chief Justice Burger when he became the Chief Justice. That committee was required to review financial disclosure statements. The review com-

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of Civil Procedure, with special questions directed to their experiences with misuse and abuse of the discovery process. Specifically, the questions were related to amended rules 11, 16, and 26. Rule 11, as modified, and as used in conjunction with rule 37, allows sanctions for abuses during discovery to be imposed upon the party to the litigation, the attorney, or both.

In many of the districts, the judges reported that the rule changes merely called for an updating and that the bar had been very cooperative; in other districts,

mittee was originally composed of three federal judges, including myself, and we moved forward when the present legal ethics statute was adopted to become members of the Judicial Ethics Committee. The review committee no longer exists. But we do have under Chief Judge Markey an Advisory Committee on Codes of Conduct, and when judges are confronted with problems about whether they are in conformance with the Code of Judicial Ethics, they are authorized to write Judge Markey, who will tell them whether the conduct they outline is authorized or is prohibited by the Code of Judicial Ethics.

Does Chief Judge Markey do that as chairman of the committee or does he confer with his whole committee?

He confers with his whole committee. Because of the title we have, the Judicial Ethics Committee, it is not uncommon for me to receive a letter from a judge inquiring whether he or she is permitted by the Code of Judicial Ethics—which is quite different from the statute—to perform, or to participate, or to act in particular circumstances. I generally refer the letter of inquiry to Judge Markey and advise the inquiring judge of the reference and why it's being done.

Are there some areas, though, where your jurisdiction or the scope of your work overlaps?

No. There are none because the scope of our work is described by the statute itself; so we have no overlapping. We have recommended, through the Judicial Conference of the United States, a few suggested changes in the statute, but so far no changes have been enacted.

What recommendations did you make for statutory changes?

Well, I think the principal factor is that the District of Columbia judges, as distinct from federal judges, are included in the statute. Those judges are required to furnish, in addition to the financial disclosure form they have to file, a similar report with the District of Columbia's Judicial Tenure Commission. We have recommended to the Judicial Conference, and the Judicial Conference has recommended, that they be exempt or that they be eliminated from the judicial ethics statute.

Does that include the judges of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals?

Yes. We have recommended that they and their employees be excluded from the statute. Because the statute provides for both judicial officers and judicial employees, we have recommended that all District of Columbia people be excluded from the statute. But so far the Congress has not acted on that recommendation.

You are recommending that it be eliminated completely?

No, they would still continue to have to file with the Judicial Tenure Commission, but they would not have to file with us, which they are required to do at the present time.

Because they are really not within the jurisdiction of your committee?

They are not within our jurisdiction.

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APPENDIX C

District of Columbia Courts
Joint Committee on Judicial Administration
Washington, D. C. 20001

September 16, 1985

The Honorable Charles McC. Mathias, Jr.
Chairman, Subcommittee on Governmental
Efficiency and the District of Columbia
387 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Mathias:

The District of Columbia Retired Judge Service Act (Public Law 98-598) effective October 30, 1984, established a system to review the fitness of retired District of Columbia judges to continue to serve the Court in the status of senior judge. We fully understand the intent and purpose of this legislation, but as Chief Judge of our respective courts, we also recognize the need to encourage the continued assistance of senior judges in dealing with the escalating case loads facing the District of Columbia Courts. We have encountered some problems in the implementation of Public Law 98-598 which make it more difficult to retain the services of qualified retired judges and offer several amendments which, if approved by the Congress, would further the intent and purpose of this law.

The current requirement contained in Public Law 98-598 that a senior judge be subject to reappointment every two years is restrictive and limits long-range planning, both on the part of the judge and the Court. It adversely affects the planning and scheduling of cases, especially in the case of a judge who is in his or her second year and who is only a few months from his or her reappointment review process. If Public Law 98-598 is amended so as to extend the reappointment requirement to five (5) years, except in the case of a judge who is over the age of seventy-four (74) years at the time of his or her initial appointment or reappointment, we believe the intent and purpose of Public Law 98-598 would continue to be met and a major problem resolved. In the case of any judge over the age of seventy-four (74) years, such judge, under the proposed amendment, would be subject to review every three (3) years.

We would also suggest that a judge, who is not of mandatory retirement age, retiring before the expiration of his or her term, should not be subject to review until he or she reaches mandatory retirement age or the expiration date of his or her term. The judge would not have been subject to a review had he or she continued as an active judge and the mere change of status does not seem to merit the cumbersome review as provided in the legislation.

In addition, it would be helpful to the District of Columbia Courts if Public Law 98-598 could be amended so as to allow the appropriate chief judge, without regard to Public Law 90-590, to appoint qualified retired judges to perform certain essential functions within the Court, other than the hearing and trying of cases, such as administrative and arbitration functions. While

the performance of these functions is essential to the Court, we do not believe such appointments would violate the intent and purpose of Public Law 98-598. Yet, the performance of such functions by judges, so appointed, would relieve other judges from such duties and permit them more time on the bench.

A final problem that we have encountered, is the inflexibility as to the timing of a request for an appointment to serve as a senior judge. As we interpret Public Law 98-598, a judge has basically a one-time opportunity to request appointment to the position of senior judge. If he or she, for any reason, fails to timely request appointment to serve as a senior judge, that opportunity is thereafter foreclosed to that judge and the Court loses the service of that judge. The judge is thereafter precluded from providing his or her services, although fully competent and willing and able to serve. The reason the judge would be unable to serve would have nothing to do with his or her fitness to serve, but would be due solely to the fact that the judge failed to make a timely request.

We appreciate the opportunity to present our views to you concerning problems with Public Law 98-598. If you believe our concerns have merit, we would be most grateful for any action which you might take to resolve these concerns. We have taken the liberty of enclosing a draft bill for your consideration which we believe addresses the aforementioned concerns.

Thank you for your consideration of this matter.

W. C. Pryor

Chief Judge William C. Pryor
District of Columbia Court of Appeals

H. Carl Moultrie I

Chief Judge H. Carl Moultrie I
Superior Court of the District of Columbia

cc: Judge James A. Belson
Judge George H. Goodrich
Judge Reggie B. Walton
Larry P. Polansky, Esquire

Senator MATHIAS. Judge Moultrie.

TESTIMONY OF CHIEF JUDGE H. CARL MOULTRIE I, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ACCOMPAINED BY JUDGE FRED B. UGAST, PRESIDING JUDGE, CRIMINAL DIVISION, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, AND LARRY P. POLANSKY, EXECUTIVE OFFICER, DISTRICT OF COLUMBIA COURTS

Judge MOULTRIE. Good morning, Senator.

Senator MATHIAS. It is a pleasure to have you with us again.

Judge MOULTRIE. Thank you, sir. First, let me express my deep appreciation to this committee for arranging this hour for us to testify. It gave me the opportunity to adhere to my doctor's advice to keep my chemotherapy appointment so I appreciate the change in the hour.

Second, let me join Judge Pryor. You have my formal statement for the record.

I will join him in urging you to consider and to reconsider the compensation issue. There is no doubt in my mind—and I am sure in the minds of anyone in this city—that the local court judges work as hard as any judges in any jurisdiction. On the question of equal pay, we are asking that you consider the fact that the 10-percent differential makes a big difference in the caliber of persons coming on the bench and staying on the bench. We urge you, sir, to please accept that.

I will make reference to a couple of items, first of all, keeping in mind that the philosophy behind this administration is to make the trial court fully accessible to the citizens of this city, to eliminate any unnecessary delay in the trial of criminal, family, and civil matters, to reduce the individual burdens of the jury service and involve a greater cross-section of citizens as jurors, and to dispense justice with dignity, fairness, and dispatch.

Any local court, in order to achieve its goal, must have as its premise those particular factors. We urge you, sir, to accept the bill with reference to the one trial/one day system.

Some months ago we conducted an experiment. The experiment showed that if we were able to change the present rule, we could add significant numbers of persons who are now exempt from service. Those persons would serve either one day or one trial, which is preferable to serving 2 weeks as they do now in our jury system.

We urge you, sir, please to accept that bill.

Some time ago, with your cooperation, we introduced and put into effect the hearing commissioner concept. The hearing commissioner concept—and I want to clear up what may appear to be a misconception—there has not been anything derogatory said about the system itself, but it appears that there are those persons who believe that, in accordance with the statute which says that it is the Chief Judge who may appoint hearing commissioners, that this is the case; but for the record, sir, I have never appointed a hearing commissioner.

When we receive applications, upon need, those applications are assembled, and they are given to our five presiding judges; and

then the presiding judges, along with the Chief Judge, make the selection.

We have changed our system. I will ask you to accept the fact that we have changed it so that it will no longer be the presiding judges and the Chief Judge but will be the Board of Judges—that is, all 51 judges.

The reason we do that, sir, is this. You mentioned in your opening statement that, back in 1970 when you had the wisdom to establish the local court system, you established a one-tier court system. This idea of having a two-tier court system is going backwards. It is contrary to what you did in 1970. For example, there are those persons who propose that the hearing commissioners will be appointed by a special board. That special board will recommend selection and they—the commissioners—will be removed by a special board. If we do that we are setting up a two-tier system which is inconsistent since this city boasts it is one of the few one-tier systems in the country.

We urge you, sir, not to accept the two-tier system but to change the statute whereby the Board of Judges will be totally responsible for the management of the hearing commissioners. That will still give us a one-tier court system.

I have asked Judge Ugast and Mr. Polansky to be present to answer any questions in connection with these two bills, and I thank you, Sir.

Senator MATHIAS. Well, thank you very much.

Let me start out with a question for Judge Pryor. It is very helpful for the committee to have this opportunity to review the legislative package.

We might turn, first, to section 9 of H.R. 3578, which would authorize the District of Columbia Court of Appeals to answer questions of District law that were certified to it by a Federal court or by the appellate court of a State.

The question of workload always comes up. It is something that Judge Moultrie and I have talked about over the years. Would you have any way of knowing what the impact of this proposal would be on the workload of the court?

Judge PRYOR. In investigating that, we certainly took that into account, and I would say two things. In checking around the country, we did not find that this kind of statute produced a great deal of work. Second, built into the statute that we would prefer there would be a provision that only allowed these questions to come to our court from other appellate courts of the highest level. That in itself would limit the amount of work that could come to us, and I think that is key with regard to how much work would be generated.

Senator MATHIAS. Do you think they would come on a regular basis? Would it be intermittent? Have you any observation as to how this works in other jurisdictions?

Judge PRYOR. It is hard to predict, but it evolves in this fashion. A question comes up where some other jurisdiction, usually the Federal court, has occasion to apply the law of the District of Columbia; and in that unpredictable circumstance where we have not plainly stated it, then this certification of question would arise.

In the course of a year how often that would be, I simply must honestly tell you that I don't know. We have looked around and tried to guess and anticipate, and our sense is that it would not happen that much.

That is my best and most candid answer.

Senator MATHIAS. Well, that is reassuring in terms of adding to the already-heavy burdens of the court.

Judge PRYOR. I must say that I appreciate your concern in that regard because no one is more concerned about that than I am. We have quite a lot to do, and I certainly would not want to add to it without real justification.

Senator MATHIAS. That is right. And, when you have a lot to do, even picking up one more piece of paper in the course of the day just adds one more thing to think about, one more decision to make.

Judge PRYOR. True.

Senator MATHIAS. If I could turn to Judge Moultrie, you noted that the superior court recently ran a test of a 1 day/one trial jury program, and the indications are that it was acceptable, both from the point of view of the court and from the point of view of the citizens who participated. That is a correct perception; isn't it?

Judge MOULTRIE. Correct. It was generally accepted by the bench, by the bar, and by the citizens. We had people asking us, No. 1, why hadn't we done this before, why don't we follow Montgomery County and other counties, why is it that doctors don't serve or others do not serve. In fact, it was generally accepted, and many people believe that we have been derelict in our duty in not putting it into effect, not realizing that you just can't change things overnight. It was well received, sir.

Senator MATHIAS. So, it would be the intent of the Board of Judges to adopt that plan under the authority that would be granted by H.R. 2946?

Judge MOULTRIE. That is correct, Sir.

Senator MATHIAS. What about the length of time that it would take to get a new jury plan into effect, once it has passed the Congress and gone to the President? As I read the bill, it won't take effect for 180 days after enactment. That is half a year, 6 months.

After that, there has to be some action by the Board of Judges, and that comes back to the Congress for a 30-legislative day review period. Is there any way, in your judgment, that we could reduce all of that timelag?

Judge MOULTRIE. Senator, I don't know.

Larry Polansky is my expert on this. Is there any way that we could reduce the time?

Mr. POLANSKY. Well, we believe that the 180 days is sufficient—during that time we would be performing the functions necessary to begin implementation, that is, developing the means of preparing the numbers of juror notices that would be required, getting the bench's plan, the jury plan for the District of Columbia, in place and having the Board of Judges adopt their plan and procedure.

We anticipated the 180 days to be a concurrent period of time with preparation time, so that when the House committee asked similar questions. I believe we agreed that 180 days would be a sat-

isfactory time limit and that the system could begin almost immediately after the 180 days.

Senator MATHIAS. But then you have got the 30 days.

Mr. POLANSKY. The 30 days for Congress to act.

Senator MATHIAS. Yes.

Has the Board of Judges been able to accomplish any of the groundwork in anticipation, other than the test run?

Mr. POLANSKY. They have had us working on the preparation of the written plan. There has been no voting at this point on the proposal that we have prepared for them.

Senator MATHIAS. Suppose there were a disposition in the Congress to expedite the plan some way or another. Would you have an adequate jury pool available?

Mr. POLANSKY. Assuming that we are permitted to call with less than a 2-year period—at the present time there is a 2-year exemption, if you want it, if you have served in the past 2 years. Assuming that were gone, then we can use the pool that we have, which is large enough for us to get started and for us to maintain for a 24-month period.

Senator MATHIAS. But you would need to have the exemption repealed?

Mr. POLANSKY. Yes.

Senator MATHIAS. Judge Moultrie, H.R. 2946 would broaden the base of people who could be summoned for jury duty in the District of Columbia by eliminating some of the blanket exemptions that apply in the Federal district court.

You have had a lot of experience and you have seen a lot of these questions work out in a practical way. Is it your opinion that there would be adequate numbers of potential jurors for both courts in the District of Columbia?

Judge MOULTRIE. Yes, sir; there is no question about it. There are people now who are merely exempt because of their status. They, themselves, would like to serve. There is no question in my mind.

You see, what you are asking me, Senator, is this. You are asking a person to serve 1 day or one trial. I don't know an employer who is not for the idea. All employers are for the idea because it means that it will be only one trial or 1 day.

So, the answer to the question is yes, I think we have a sufficient pool.

For example, sir, you might be surprised. Just the other day a lady said to me, "I was sorry to read about your cancer," she said, "but if you changed the system, you could serve 1 day before you die."

Senator MATHIAS. That raises the further question of what blanket exemptions would have to be retained. What classes of people would you contemplate exempting under the Board of Judges' plan?

Judge MOULTRIE. Mr. Polansky can answer that question.

Mr. POLANSKY. Our answer to that is that no individual or class of people may be disqualified, excluded, excused, or exempt. But there could be deferral from jury service, upon a showing of undue hardship, extreme inconvenience, public necessity, temporary physical or mental disability.

But no group of individuals could be excused.

Senator MATHIAS. No status exemptions?

Mr. POLANSKY. That is right.

Senator MATHIAS. Judge Robinson has raised some concern about provision being made in the superior court master plan for jurors who have been summoned for appearance both in the district court and in the superior court.

Is this a widespread concern?

Mr. POLANSKY. No, it is not. Before I answer that, we don't presently have a problem. Perhaps, if that has been a problem, it has been a mechanical problem in the computer system.

But I would point out to you, Senator, that in every other jurisdiction in the United States the jurors can be used in either court, and there is no exemption if you have served in a local court from serving in the Federal court and vice versa. So, theoretically each of us would have the full of-age population of the District of Columbia to use. But within the current procedure, where one serves in only one court during the year period, as we now operate, we have been able to accommodate juror needs and will continue to be able to.

Senator MATHIAS. I have a copy of a letter that was sent to Chief Judge Moultrie from the Justice Department, generally endorsing H.R. 2946. I think it might be appropriate to make that copy a part of the record at this point, Judge Moultrie. Without objection, that will be done.

Judge Moultrie, would it be your intent to share your experience under the new jury system with the Department of Justice and with the district court?

Judge MOULTRIE. Yes. I believe we have a letter which should be a part of the files showing that there is agreement. Mr. Polansky might read that letter.

Mr. POLANSKY. We have a letter from the Department of Justice which was in response to a letter from Judges Pryor and Moultrie, which went to the Department of Justice which, apparently, had previously transmitted a letter to the House District Committee that indicated some reservations about the jury bill as it appeared in the House version.

We wrote to them requesting the opportunity to describe what we thought were the answers to their reservations. The letter that we have and which we would ask be introduced into the record is a letter from Deputy Attorney General Jensen indicating that Justice is now quite satisfied that the proposal that is in that bill would satisfy all of the needs and that Justice would no longer have reservations regarding that bill.

Senator MATHIAS. Thank you very much.

At this point in the record, we will insert that letter, without objection.

[The letter referred to follows:]

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 30, 1986

The Honorable H. Carl Moultrie I
Chief Judge
Superior Court of the District of
Columbia
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Dear Chief Judge Moultrie:

Thank you for your letter of January 3, 1986, in which you addressed a number of issues regarding H.R. 2946, a bill that would establish an independent jury selection system for the Superior Court of the District of Columbia and would provide for a number of reforms in the jury selection process.

We appreciate your careful analysis of this bill and your comments regarding the potential impact of this legislation on the D.C. Superior Court system. In particular, your letter persuasively addressed a number of concerns originally raised in the Department's July 31, 1985, letter to Congressman Dellums. In that letter we had expressed strong support for the laudatory substantive reforms included in H.R. 2946, but had expressed some reservations regarding the attendant administrative burdens and financial costs which might arise from a bifurcated jury selection system.

Since we submitted our July letter to Congressman Dellums, we have had an opportunity to examine this issue further and to benefit from additional analyses and comments such as yours regarding the administrative costs and burdens of this proposal. We are persuaded that the substantive reforms of this legislation can be implemented without any significant additional cost or administrative burdens to the Federal Government, and indeed could result in some savings. As we noted in our July 25 letter, we believe that many of the proposed reforms of H.R. 2946 merit consideration for broader application to the federal jury selection system, and in that regard if this legislation is enacted we would be able to benefit from the District's experience in implementing this legislation.

Again, thank you for your thoughtful and insightful comments regarding this legislation. We will advise the appropriate congressional committees that our initial concerns regarding this legislation have been satisfied.

Sincerely,

D. Lowell Jensen
Deputy Attorney General

Senator MATHIAS. Judge Moultrie, you raised the question of the hearing commissioners. As you know, several of the witnesses who will appear after you this morning will raise some important questions about the provisions of H.R. 3578 which permanently authorize the use of hearing commissioners in the superior court.

I am sure that I can anticipate some suggestions for modifications in language. There are three areas that, as I understand it, probably raise the most serious concerns. One is the appointment procedure; one is position security; and the other is the disciplinary procedures.

I anticipate that witnesses will recommend a merit selection process of some sort, a fixed term of some length to be established for the position, possibly including a probationary period, and that the District Commission on Judicial Disabilities and Tenure have the jurisdiction to discipline a hearing commissioner.

Do you have any thoughts on these ideas?

Judge MOULTRIE. I am definitely opposed to that, Senator, as I said at the beginning. No. 1, you are setting up, then, a two-tier court. You are going backwards to what we did in 1970.

What you are indicating is that there seems to be some question whether the chief judge should be the one to select hearing commissioners and/or remove hearing commissioners. We have earlier today suggested, that the Board of Judges——

Senator MATHIAS. Broaden it out?

Judge MOULTRIE. That is right, be the total responsible body for selecting and/or removing.

But, sir, if you go back to having a special committee to review the action of those commissioners, as they do the Board of Judges now, then you are setting up a two-tier court, to which I am bitterly opposed.

Senator MATHIAS. So, as you conceive it, the commissioners are, really, an extension of the court, of the judges?

Judge MOULTRIE. That is correct, sir. And the Board of Judges should determine its functions and the duties and——

Senator MATHIAS. And oversee it?

Judge MOULTRIE. Yes, oversee it.

We have suggested that.

Senator MATHIAS. Do you see the bill, as it is currently drafted, as affecting sitting hearing commissioners?

Judge MOULTRIE. I didn't understand the question.

Senator MATHIAS. Would the bill apply to the sitting commissioners, to the existing commissioners?

Judge MOULTRIE. Well, I suppose, with the changes we suggest, it would because, first of all, the Board of Judges would set rules, and I would suspect that the rules that we now have would merely mean—the whole thing, Senator, seems to be based on the fact that the statute says that the chief judge may appoint. That seems to be the contention. That seems to be in the minds of some people; that it should not be the chief judge.

And, we agree. We have no problem with that whatsoever. But we do believe that, if you say that we will have a board to make selections and make recommendations and then a board to monitor and a board to remove, then you are setting up a two-tier court, which we are against.

Mr. POLANSKY. Senator, might I point out that we have proposed language that we believe provides for what Judge Moultrie is describing. It would require a small change to the language to limit several of the sections to the rules of the superior court which are promulgated by the Board of Judges of the superior court.

Senator MATHIAS. In other words, you really reject Professor Broderick's contention that this is a second tier of the court system. Instead, you maintain that if you keep it all within the control of the Board of Judges, that it becomes an extension of the Board of Judges' own judicial functions and that it is not a second tier but merely part of the operation of the Board of Judges?

Judge MOULTRIE. That is correct.

Senator MATHIAS. An integral part of the work of the court?

Judge MOULTRIE. That is correct.

Senator MATHIAS. Finally, Judge Moultrie, let me ask you what is your reaction to the idea of the subcommittee asking, say, the bar or some kind of independent group to study the question of hearing commissioners in the superior court? Do you think that is necessary, or do you think we have enough information on that subject?

Judge MOULTRIE. Sir, you have to be very careful. I have always tried to work with the bar on every item that I can, but I would say that another study, I believe, would serve no further purpose.

We have an ongoing situation, and it appears that the only thing that really disturb the others is who does the appointing and who does the removing. I don't think it is necessary to have any further study.

However, let me hasten to say that if there is a study, the superior court will, as always, cooperate.

Senator MATHIAS. Well, we appreciate that, and it is certainly your record to be very cooperative and very helpful in all of these matters.

Judge MOULTRIE. Thank you, sir.

Senator MATHIAS. There is just one other item, the question of pay, compensation, the adjustment from 90 percent to 100 percent of the Federal level.

That is not currently in the bill. That is something which the committee could consider as an amendment to the bill, but that would have to be an addition. I simply point that out.

We are very grateful, Judge Pryor and Judge Moultrie, for your testimony here this morning. I appreciate your being here.

Judge Moultrie, I have great admiration for your determination, your personal determination, and I think it sets a very remarkable example for all of us in the community.

Judge MOULTRIE. Thank you, sir; I will be fighting.

Senator MATHIAS. I am sure you will.

Thank you very much.

[Judge Moultrie's prepared statement follows:]

Testimony of Chief Judge H. Carl Moultrie I
Superior Court of the District of Columbia
before the
Senate Subcommittee on Governmental Efficiency
and the District of Columbia

March 5, 1986

Chairman Mathias and members of the Subcommittee on Governmental Efficiency and the District of Columbia, it is my pleasure to be here today to testify in support of the District of Columbia Courts' proposal for legislative changes which I believe are needed to improve the operational efficiency of the Superior Court of the District of Columbia and to achieve the following several goals which I have articulated for the Superior Court:

* To make the trial court of the District of Columbia fully accessible to the citizens of our capital city;

* To eliminate any unnecessary delay in the trial of criminal, family and civil matters;

* To reduce the individual burden of jury service and involve a greater cross section of citizens as jurors; and

* To dispense justice with dignity, fairness and dispatch.

I urge your support of the entire court legislative package which would greatly assist the Superior Court in fulfilling the mandate of Congress when it reorganized this court system in 1971.

I will address the Court's proposed jury bill, and the very similar House bill H.R. 2946, which would permit greater flexibility and efficiency in the selection and utilization of jurors in the Superior Court of the District of Columbia. The proposed legislation would broaden the base of persons who could be summoned for jury duty. Considering the increasing volume of caseload in the Superior Court, this aspect alone would justify the suggested changes since the District, which uses voter registration and driver license files as its source of jurors, is limited to drawing its jurors from approximately half of the 630,000 people living within the borders of the City. More important, however, are the aspects of the proposal which would permit the Superior Court the flexibility to directly manage the processing of prospective jurors and, thereby, provide the capability to adjust juror calls to the increasing and varying demands of the Court's caseload. This legislation would also provide the Court with the ability to qualify and summon jurors in a one step process.

You may be aware that the Superior Court recently conducted an experimental one trial/one day jury program which was very well received. Without the changes asked for in the legislation, it would be impossible for the Superior Court to implement the one trial/one day system which requires a substantial increase in the size of the pool of eligible jurors. This would be accomplished primarily through the elimination of the many exemptions and excuses from service provided by the existing federal statute and the U.S. District Court plan. We are delighted to report that we have received a letter from Deputy Attorney Jensen indicating that all ". . . initial concerns (of the Justice Department) regarding this legislation have been satisfied."

In short, we unqualifiedly endorse these changes and solicit your bi-partisan support.

Permit me to now address an issue of major importance to the Superior Court. We need for you to make the successful, three year old, hearing commissioner program a permanent feature of the Superior Court operation and to moderately expand the authority of the commissioners to make them an even more effective component of the case processing system. The changes proposed in the Court's legislative package, as well as by House Bill H.R. 3578, provide the permanence needed to build upon and improve the commissioner program, as well as the procedural flexibility and authority required to ease bottle necks that we have encountered in the use of hearing commissioners over the past three years. We have, however, determined that there are some language changes which should be made to our original proposal which would provide additional participation by the full court in the selection, dismissal and assignment of hearing commissioners through the Superior Court rule-making process.

(A copy of the proposed amendments to Section 3 of H.R. 3578 which would accomplish the above changes to the hearing commissioner legislation is attached to this statement.)

Finally, we have recently suggested additional changes to Hearing Commissioner authority which would provide the link required to conform District of Columbia child support procedures with the federal regulations promulgated under the Child Support Enforcement Amendments Act of 1984 (Public Law 98-378). These changes are needed to bring the District of Columbia into compliance with the Child Support Enforcement Amendment Act and the federal regulations promulgated thereunder, which, respectively, advocate and mandate the expedited processing of child support matters.

The Congress, in my opinion, has created through court reorganization, the vehicle for establishing an exemplary trial court. We request, through your oversight powers and thoughtful review of these proposed modifications, that you fine tune this system and continue the progress that has been achieved over the past decade and a half.

Attachment

Sec. 3. HEARING COMMISSIONERS.

Section 11-1732 of title 11 of the District of Columbia Code is amended to read as follows:

" 11-1732. HEARING COMMISSIONERS.

(a) Subject to standards and procedures established by the rules of the Superior Court, the ~~"(a) The~~ chief judge of the Superior Court may appoint and remove hearing commissioners who shall serve in the Superior Court and perform the duties enumerated in subsection (c) of this section and such other duties as are consistent with the Rules of the Superior Court and the Constitution and laws of the United States and of the District of Columbia ~~and are assigned by rule of the Superior Court~~.

"(b) No individual may be appointed or serve as a hearing commissioner under this section unless such individual has been a member of the bar of the District of Columbia for at least three years.

"(c) A hearing commissioner, when specifically designated by the chief judge of the Superior Court, and subject to the rules of the Superior Court, may perform the following functions:

"(1) Administer oaths and affirmations and take acknowledgments.

"(2) Determine conditions of release and pretrial detention pursuant to the provisions of title 23 of the District of Columbia Code (relating to criminal procedures).

"(3) Conduct preliminary examinations in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it.

"(4) Subject to the provisions of subsection (d); ~~with the consent of the parties involved, make findings in uncontested proceedings, and in contested hearings in the civil, criminal, and family divisions of the Superior Court.~~

~~"(d)(1) With respect to proceedings and hearings under subsection (c)(4), a rehearing of the case, or a review of the hearing commissioner's findings, may be made by a judge of the appropriate division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed within ten days after the judgment. An appeal to the District of Columbia Court of Appeals may be made only after a review hearing is held in the Superior Court.~~

"~~(2)~~(A) In any case brought under sections 11-1101 (1), (3), (10), or (11) involving the establishment or enforcement of child support, or in any case seeking to modify an existing child support order, where a hearing commissioner in the Family Division of the Superior Court finds that there is an existing duty of support, the hearing commissioner shall conduct a hearing on support, make findings, and enter judgment which shall constitute a final order of the Superior Court.

"(B) If in a case under subparagraph (A), the hearing commissioner finds that a duty of support exists and makes a finding that the case involves complex issues requiring judicial resolution, the hearing commissioner shall establish a temporary support obligation and refer unresolved issues to a judge.

"(C) In cases under subparagraphs (A) and (B) in which the hearing commissioner finds that there is a duty of support and the individual owing that duty has been served or given notice of the proceedings under any applicable statute or court rule, if that individual fails to appear or otherwise respond, the hearing commissioner shall enter a default order which shall constitute a final order of the Superior Court.

"(5) Subject to the provisions of Subsection (d), with the consent of the parties involved, make findings and enter final orders or judgment in other uncontested or contested proceedings, including trials, in the Civil, Criminal and Family Divisions of the Superior Court.

~~"(D) A rehearing or review of the hearing commissioner's findings in a case under subparagraphs (A) and (B) may be made by a judge of the Family Division sua sponte. The findings of the hearing commissioner shall constitute a final order of the Superior Court".~~

"(d) With respect to proceedings and hearings under subsections (c)(4) or (c)(5), a review of the hearing commissioner's order or judgment, in whole or in part, may be made by a judge of the appropriate division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed within ten (10) days after final order or judgment. The reviewing judge shall conduct such proceedings, if any, as that judge deems appropriate. An appeal to the District of Columbia Court of Appeals may be made only after a Superior Court Judge has reviewed the action.

Senator MATHIAS. Our next witness will be Mr. John Suda, the acting corporation counsel.

Mr. Suda, I will extend to you the same privilege that I did to the judges of submitting your statement and making such additional comments as you see fit.

TESTIMONY OF JOHN H. SUDA, ACTING CORPORATION COUNSEL FOR THE DISTRICT OF COLUMBIA

Mr. SUDA. Thank you very much, Mr. Chairman.

I am pleased to appear before you today on behalf of the mayor of the District of Columbia to testify on the District of Columbia Jury System Act and the Judicial Efficiency and Improvement Act of 1985. We strongly support these bills and urge favorable committee action upon them. The District of Columbia Jury System Act would establish a jury system in the Superior Court of the District of Columbia separate and distinct from that of the U.S. District Court for the District of Columbia.

The bills' encouragement of independence of the local trial court is consistent with the spirit of the District of Columbia Self-Government and Governmental Act of 1973.

We endorse the items that are in the Jury Act. The superior court's needs are different from those of the district court. It utilizes larger juries generally, handles a larger caseload of jury trials. This bill would enable that court to tailor the jury system to its own unique needs.

As you have heard testimony today, the Board of Judges already has endorsed a 1 day/one trial rule, that is, a practice by which a petit juror would serve only for a single day or the duration of a single trial, whichever is longer.

While the bill would not explicitly enact this provision, the bill would amend the D.C. Code, section 11–1911, to provide that the length of service shall be specified in the jury plan to be devised by the Board of Judges and provides generally that an individual shall not be required to serve more than once within a 24-month period. This provision, along with the 1 day/one trial rule, will serve to better assure a pool of alert, interested jurors who have not been burdened with days of waiting to be selected for a petit jury.

If a juror is not selected on the first day, he or she would be dismissed. If selected, a juror would serve for the duration of a single trial and then be released.

In regard to H.R. 3578, a number of provisions of the bill merit recognition as enhancing the district's self government. Among these are section 4 which would authorize the District of Columbia court system to appoint its own executive director and section 9 which would empower the District of Columbia Court of Appeals to rule on controlling questions of District of Columbia law, which are certified to it by the U.S. Supreme Court, any U.S. court of appeals, or the highest court of any State.

This would have the effect of recognizing that the D.C. Court of Appeals is the primary authority on questions of District of Columbia law.

Of great importance in H.R. 3578 is section 3 which makes permanent the service of hearing commissioners in the superior court.

Let me state at this point that I agree with Chief Judge Moultrie that the appointment of the hearing commissioners ought to lie with the Board of Judges. I say this because I believe that the hearing commissioners, as constituted in this bill, are an extension of the superior court and are not a separate entity. In fact, they would function as an extension of the superior court judges.

I also subscribe to the proposition that, were this done in another fashion, we would be setting up a two-tier system, and I would urge that we should avoid that.

The section which would be amended would be section 11-1732 of the D.C. Code. Among other things, it would permit hearing commissioners to enter final judgments in cases involving the establishment or enforcement of child support, including modifications of existing child-support orders. Unlike other matters over which hearing commissioners would have authority to act, in child-support cases consent of the parties would be unnecessary. This is very important to the District of Columbia government. Where a case involves a complex issue of law, which requires judicial resolution, a hearing commissioner would be required to enter a temporary support order and then refer the issue of law to a judge. Finally, hearing commissioners would be empowered to enter a default judgment in child support cases if the individual owing a duty of support does not respond to a notice to appear.

Taken together, the provisions of section 3 ensure an expedited child support enforcement process. More importantly, such expedited procedures are required by the Child Support Enforcement Amendments of 1984, and I am specifically referring to Public Law 98-378, as a condition of receiving Federal funds under title IV, D of the Social Security Act. The provisions of section 11-1732 would meet the specific requirements of the Federal law in regulations promulgated under the authority of that law. In other words, Mr. Chairman, we need this authority for the hearing commissioners to be able to handle child-support cases on an expedited basis. We need this in order to comply with the Federal law under which we get funds to support our child-support enforcement effort.

We urge the passage of this bill. Failure to institute expedited hearing procedures could jeopardize millions of dollars of funding for both the District's Child Support Program and its Aid to Families With Dependent Children Program. Such a loss of funding would be devastating to a large number of District citizens who rely on assistance through these programs.

In conclusion, the executive branch of the District of Columbia government supports both H.R. 2946 and H.R. 3578. Both are significant in their advancement of self-determination for the District. Moreover, the provisions authorizing hearing commissioners to deal expeditiously with child-support matters are vital to the continued effectiveness of the District's child-support enforcement efforts.

Thank you for this opportunity to speak on these issues.

Senator MATHIAS. Without objection, we will include in the record your written remarks.

You say that you support the proposal to give to the court the authority to create a new jury plan.

Mr. SUDA. Yes.

Senator MATHIAS. I assume that that means specifically you support a 1 day/one trial system?

Mr. SUDA. That is correct, Mr. Chairman. I not only support this bill, but I support the proposition that a more effective system is created by a 1 day/one jury concept.

Senator MATHIAS. Do you think that the city can support two separate and distinct jury systems?

Mr. SUDA. Yes. No. 1, two systems are ordinarily supported in other jurisdictions of this country with ease. No. 2, this is, populationwise, a large city, and, even though the Federal court here, I believe, has a larger docket than Federal courts in other jurisdictions, I believe there is ample person power in this city to support both jury systems for both courts.

Senator MATHIAS. Then you think Judge Robinson is unduly concerned about the possibility that jurors could be summoned in both systems simultaneously?

Mr. SUDA. No, I would not say that Judge Robinson is unduely concerned. I think it is a concern, but I think it is a matter that can be practically worked out and has to be practically worked out. There has to be a mechanism within the computers of both systems to avoid a person being called both to the Federal court for jury duty and the local court at the same time. It seems to me, with all that science has done in this computer age, that ought to be a matter that can be avoided nine-tenths of the time, and in the one or two occasions that occur, when that occurs, I think those situations can also be readily resolved.

For example, the Federal juror may well be called for 30 days. If that is the case and his name, through some error, comes up in the superior court system, I am sure the superior court would bend to the Federal court's use of that person for the full 30 days.

In other words, I think it is a problem that should be addressed, but I think it can easily be addressed.

Senator MATHIAS. What about the wisdom and propriety of volunteers?

Mr. SUDA. Volunteer jurors?

Senator MATHIAS. Yes, adding the names of volunteers to the list.

Mr. SUDA. I would have a philosophical problem with the use of volunteers. I am not so sure it is a legal problem. The problem I would have with the use of volunteers is that our system—since our system began—has been based upon citizens across the board being used for juries. The use of volunteers flies in the face of the impartiality of that system.

Senator MATHIAS. A volunteer could conceivably have an interest, is that right?

Mr. SUDA. A volunteer could conceivably have an interest, or volunteers could conceivably come from one class or another of persons, more readily than another class of persons.

To that extent, we would be departing, it seems to me—and, again, this is philosophical—that we would be departing from our principles and that is deriving our juries from across-the-board names.

Senator MATHIAS. On the subject of the Judicial Efficiency Act, how does the city feel about the need for section 2 which would re-

quire that the U.S. attorney for the District of Columbia report to the mayor each year on prosecution statistics?

Mr. SUDA. First of all, section 2 really just says that the U.S. attorney shall compile and make available—it doesn't say to the mayor—an annual report, and it then describes the annual report that is necessary.

Senator MATHIAS. "Make available" to you means publish?

Mr. SUDA. Yes. My understanding is that the U.S. attorney opposes this section. I have taken no position on this section for the very simple reason that I know that the U.S. attorney already compiles statistics in some measure. While the statistics, perhaps, are not in the fashion that is described in section 2, he already compiles statistics. I understand he opposes section 2. I have not taken a position on section 2.

Senator MATHIAS. But your understanding is that we are not asking for anything other than what is presently published.

Mr. SUDA. My reading of section 2 is that it doesn't really ask for anything more than the U.S. attorney already does. On the other hand, he knows how he compiles his statistics better than I do, which is why I really can't take a position on it.

If in fact he compiles his statistics in a fashion which is different from the way that is laid out in section 2, then he may well have a practical problem in coming up with the statistics that are asked for here.

If that is the case, it really would not be appropriate for me to comment on it. That, again, is why I have not taken a position on section 2.

Senator MATHIAS. You have emphasized the importance of the provisions of H.R. 3578 which affect the establishment of an expedited procedure to handle child support enforcement.

Mr. SUDA. Yes.

Senator MATHIAS. Let us assume, without concluding, that Gramm-Rudman or other complications prevent the Congress from acting on this this year. Is there any authority at the local level, either the council or rule of court or otherwise, that might handle this problem?

Mr. SUDA. First of all, there is a bill in front of the council, and I should identify it to you. It is bill No. 6-134. It is in front of the District of Columbia Council, and it concerns procedure for the expedited enforcement of child-support matters.

It has not been voted on yet, and I am not sure that it is really appropriate to be voted on yet because it, in some measure, depends upon the bill that is before you. What it lays out is an expedited procedure that a hearing commissioner will hold in child-support cases.

My feeling is that that bill cannot be acted on by the city council until this body decides whether or not hearing commissioners are going to become a permanent entity in the superior court. Otherwise the council bill will be referring to something that may not exist.

If, for example, this body does not enact the hearing commissioner bill—then I think some revision will have to occur at the council level in an attempt to come up with an alternative expedited procedure.

One thing is for sure. We have to come up with an expedited procedure. Federal law requires that.

If we cannot use the hearing commissioner mechanism for the reason that hearing commissioners don't exist, then we will have to come up with another procedure.

Senator MATHIAS. What is the timetable under Public Law 98-378?

Mr. SUDA. I am not familiar with the exact timetable, but I do know that it is an urgent matter for us. I am sorry, I don't have the exact time on that.

Senator MATHIAS. We will check that.

Thank you very much, Mr. Suda, for being with us.

[Mr. Suda's prepared statement follows:]

TESTIMONY OF JOHN H. SUDA

ACTING CORPORATION COUNSEL, D.C.

BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL

AFFAIRS, ON THE DISTRICT OF COLUMBIA JURY SYSTEM ACT

AND THE JUDICIAL EFFICIENCY AND IMPROVEMENT ACT OF 1985

MARCH 5, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I AM PLEASED TO APPEAR BEFORE YOU TODAY ON BEHALF OF THE MAYOR OF THE DISTRICT OF COLUMBIA TO TESTIFY ON H.R. 2946, THE "DISTRICT OF COLUMBIA JURY SYSTEM ACT" AND ON H.R. 3578, THE "JUDICIAL EFFICIENCY AND IMPROVEMENT ACT OF 1985." WE STRONGLY SUPPORT THESE BILLS AND URGE FAVORABLE COMMITTEE ACTION UPON THEM. BOTH BILLS REPRESENT WELCOME IMPROVEMENTS TO THE DISTRICT'S JUDICIAL SYSTEM, AND IN SOME MEASURE FOSTER INCREASED SELF-GOVERNMENT FOR OUR CITY.

THE DISTRICT OF COLUMBIA JURY SYSTEM ACT WOULD ESTABLISH A JURY SYSTEM IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA SEPARATE AND DISTINCT FROM THAT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. THE BILL'S ENCOURAGEMENT OF INDEPENDENCE OF THE LOCAL TRIAL COURT IS CONSISTENT WITH THE SPIRIT OF THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT OF 1973.

THE SUPERIOR COURT'S NEEDS ARE DIFFERENT FROM THOSE OF THE DISTRICT COURT--IT UTILIZES LARGER JURIES, GENERALLY, AND HANDLES A LARGER CASELOAD OF JURY TRIALS. THIS BILL WOULD ENABLE THAT COURT TO TAILOR THE JURY SYSTEM TO ITS OWN UNIQUE NEEDS. FOR EXAMPLE, THE BOARD OF JUDGES ALREADY HAS ENDORSED A "ONE DAY, ONE TRIAL" RULE, THAT IS A PRACTICE BY WHICH A PETIT JUROR WOULD SERVE ONLY FOR A SINGLE DAY OR THE DURATION OF A SINGLE TRIAL, WHICHEVER IS LONGER. WHILE THE BILL WOULD NOT EXPLICITLY ENACT THIS PROVISION, THE BILL WOULD AMEND D.C. CODE, SECTION 11-1911 TO PROVIDE THAT THE LENGTH OF SERVICE SHALL BE SPECIFIED IN THE JURY PLAN TO BE DEVISED BY THE BOARD OF JUDGES, AND PROVIDES, GENERALLY, THAT AN INDIVIDUAL SHALL NOT BE REQUIRED TO SERVE MORE THAN ONCE WITHIN A TWENTY-FOUR MONTH PERIOD. THIS PROVISION, ALONG WITH THE "ONE DAY, ONE TRIAL" RULE WILL SERVE TO BETTER ASSURE A POOL OF ALERT INTERESTED JURORS, WHO HAVE NOT BEEN BURDENED WITH DAYS OF WAITING TO BE SELECTED FOR A PETIT JURY--IF A JUROR IS NOT SELECTED ON THE FIRST DAY, HE OR SHE WOULD BE DISMISSED. IF SELECTED, A JUROR WOULD SERVE FOR THE DURATION OF A SINGLE TRIAL, AND THEN BE RELEASED.

WE ALSO ENDORSE THE ELIMINATION OF ABSOLUTE EXCLUSIONS OF PARTICULAR GROUPS OF THE POPULATION FROM JURY SERVICE. D.C. CODE, SECTION 11-1908 WOULD STILL AFFORD THE COURT SUFFICIENT DISCRETION TO EXEMPT INDIVIDUALS FROM JURY DUTY WHERE UNUSUAL CIRCUMSTANCES DICTATE, OR WHERE AN INDIVIDUAL WOULD BE INCAPABLE

OF RENDERING AN IMPARTIAL DECISION. HOWEVER, ELIMINATION OF BROAD EXEMPTIONS WILL PRODUCE JURIES WHICH MORE NEARLY REPRESENT A CROSS-SECTION OF THE DISTRICT'S RESIDENTS.

FINALLY, THERE ARE SEVERAL PROVISIONS WHICH WOULD MAKE PUNISHABLE VARIOUS ACTS WHICH UNDERMINE THE JURY SYSTEM. MOST OF THESE ARE PUNISHABLE AS CONTEMPT OF COURT, WHILE ONE, JURY TAMPERING (SEC. 11-1915) IS DESIGNATED A CRIME. THE COURT ITSELF WOULD INITIATE THE CONTEMPT PROCEEDINGS, BUT JURY TAMPERING WOULD BE A PROSECUTABLE OFFENSE.

TURNING NOW TO H.R. 3578, A NUMBER OF PROVISIONS OF THE BILL MERIT RECOGNITION AS ENHANCING THE DISTRICT'S SELF-GOVERNMENT. AMONG THESE ARE SECTION 4, WHICH WOULD AUTHORIZE THE DISTRICT OF COLUMBIA COURT SYSTEM TO APPOINT ITS OWN EXECUTIVE DIRECTOR, AND SECTION 9 WHICH WOULD EMPOWER THE DISTRICT OF COLUMBIA COURT OF APPEALS TO RULE ON CONTROLLING QUESTIONS OF DISTRICT OF COLUMBIA LAW WHICH ARE CERTIFIED TO IT BY THE UNITED STATES SUPREME COURT, ANY UNITED STATES COURT OF APPEALS, OR THE HIGHEST COURT OF ANY STATE. THIS WOULD HAVE THE EFFECT OF RECOGNIZING THE D.C. COURT OF APPEALS AS A PRIMARY AUTHORITY ON QUESTIONS OF DISTRICT OF COLUMBIA LAW.

OF GREAT IMPORTANCE IN H.R. 3578 IS SECTION 3, WHICH MAKES PERMANENT THE SERVICE OF HEARING COMMISSIONERS IN THE SUPERIOR COURT. THAT SECTION WOULD AMEND D.C. CODE, SECTION 11-1732, AND

WOULD, AMONG OTHER THINGS, PERMIT HEARING COMMISSIONERS TO ENTER FINAL JUDGMENT IN CASES INVOLVING THE ESTABLISHMENT OR ENFORCEMENT OF CHILD SUPPORT, INCLUDING MODIFICATIONS OF EXISTING CHILD SUPPORT ORDERS. UNLIKE OTHER MATTERS OVER WHICH HEARING COMMISSIONERS WOULD HAVE AUTHORITY TO ACT, IN CHILD SUPPORT CASES CONSENT OF THE PARTIES WOULD BE UNNECESSARY. WHERE A CASE INVOLVES A COMPLEX ISSUE OF LAW WHICH REQUIRES JUDICIAL RESOLUTION, A HEARING COMMISSIONER WOULD BE REQUIRED TO ENTER A TEMPORARY SUPPORT ORDER, AND THEN REFER THE ISSUE OF LAW TO A JUDGE. FINALLY, HEARING COMMISSIONERS WOULD BE EMPOWERED TO ENTER A DEFAULT JUDGMENT IN CHILD SUPPORT CASES IF THE INDIVIDUAL OWING A DUTY OF SUPPORT DOES NOT RESPOND TO A NOTICE TO APPEAR.

TAKEN TOGETHER, THE PROVISIONS OF SECTION 3 ENSURE AN EXPEDITED CHILD SUPPORT ENFORCEMENT PROCESS. MORE IMPORTANTLY, SUCH EXPEDITED PROCEDURES ARE REQUIRED BY THE CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984, PUB. LAW 98-378, AS A CONDITION OF RECEIVING FEDERAL FUNDS UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT. THE PROVISIONS OF SECTION 11-1732 WOULD MEET THE SPECIFIC REQUIREMENTS OF THE FEDERAL LAW AND REGULATIONS PROMULGATED UNDER AUTHORITY OF THAT LAW.

WE URGE THE PASSAGE OF THIS BILL. FAILURE TO INSTITUTE EXPEDITED HEARING PROCEDURES COULD JEOPARDIZE MILLIONS OF DOLLARS OF FUNDING FOR BOTH THE DISTRICT'S CHILD SUPPORT

PROGRAM AND ITS AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. SUCH A LOSS OF FUNDING WOULD BE DEVASTATING TO A LARGE NUMBER OF DISTRICT CITIZENS WHO RELY ON ASSISTANCE THROUGH THESE PROGRAMS.

IN CONCLUSION, THE EXECUTIVE BRANCH OF THE DISTRICT GOVERNMENT SUPPORTS BOTH H.R. 2946 AND H.R. 3578. BOTH ARE SIGNIFICANT IN THEIR ADVANCEMENT OF SELF-DETERMINATION FOR THE DISTRICT. MOREOVER, THE PROVISIONS AUTHORIZING HEARING COMMISSIONERS TO DEAL EXPEDITIOUSLY WITH CHILD SUPPORT MATTERS ARE VITAL TO THE CONTINUED EFFECTIVENESS OF THE DISTRICT'S CHILD SUPPORT ENFORCEMENT EFFORTS.

THANK YOU FOR THIS OPPORTUNITY TO SPEAK ON THESE IMPORTANT ISSUES.

Senator MATHIAS. We will now ask for a panel of witnesses to come forth: Julie Gilbert, Samuel F. Harahan, executive director of the Council for Court Excellence, Mr. John H. Pickering, the chairman of the D.C. Bar Court Study Implementation Committee.

I will make the offer that I have made to previous witnesses that your full statements may be included in the record as if read and would suggest that, in the interest of time, you may wish to make a brief summary of your testimony.

TESTIMONY OF JULIE GILBERT, COUNCIL FOR COURT EXCELLENCE; SAMUEL F. HARAHAN, EXECUTIVE DIRECTOR, COUNCIL FOR COURT EXCELLENCE; AND JOHN H. PICKERING, CHAIRMAN, D.C. BAR COURT STUDY IMPLEMENTATION COMMITTEE

Ms. GILBERT. I think I am first.

Senator Mathias, my name is Julie Gilbert. I am very pleased to be appearing before you today to present the views of the Council for Court Excellence on H.R. 2946.

As you know, the council is a local civic organization created by a group of concerned citizens from the legal, business, civic, and judicial communities in the District of Columbia. Our organizational purposes include fostering better public understanding of the judicial system and promoting reform and improvements in the administration of justice in the local and Federal courts in the District of Columbia.

I regret that my own appearance today has been occasioned by the absence from the country of Charles Horsky, president of the council, who would certainly have been here to testify on these important bills had he been able to do so.

Senator MATHIAS. I should say that there is a certain ironic twistto Mr. Horsky's absence because he has been urging me to hold these hearings.

But we will not hold that against him.

Ms. GILBERT. As you indicated, Senator, Mr. Horsky was the chairman of the District of Columbia Court System Study Committee of the D.C. Bar, which originated many of the legislative proposals now set out in H.R. 3578. In addition, in his very extensive work with the council, Mr. Horsky has been actively involved in the development of H.R. 2946 and very supportive of the one trial/1 day jury system that the bill would allow.

I know that he would want me to express on his behalf, as well as on behalf of the council, our appreciation for your consideration of these bills and for your decision to hold this hearing in the middle of a very busy session, and our hopes, as well as his, for expeditious action.

I would like to give very brief mention to a few of the matters discussed at length in our written submission with respect to H.R. 2946.

I think that it is very important to note that for more than 2 years members and staff of the Council for Court Excellence have worked closely with the leadership of the local and Federal courts in the District, the D.C. Bar, the business community as represented by the Board of Trade, the Justice Department, and with many others to develop a jury-service proposal that reflects the needs and that has the support of all segments of our community.

H.R. 2946 represents, to what I think is really an unusual extent, a true consensus. The bill is a logical step in the continuing effort of the Congress to transfer local judicial functions to the D.C. courts. Of special interest to the Council for Court Excellence, however, is the fact that the bill would allow the Superior Court to adopt the one trial/1 day procedure.

The council believes that a one trial/1 day procedure would greatly enhance citizen participation in our court system, would increase the satisfactions of jury service, and would result in more broadly representative juries. In the numerous jurisdictions in which this system has been introduced, including Anchorage, Detroit, Baltimore, and nearby Montgomery County, MD, it has won the support and endorsement of prosecutors, of court staff, of the private bar, of jurors, and of the general public. We believe that it will be a great addition to the administration of justice in the D.C. Superior Court.

I might also note that I think it was the participation of Charles Horsky as a juror in the Montgomery County one trial/1 day system several years ago that initiated the interest of the Council for Court Excellence in this program.

Sam Harahan, the executive director of the council will indicate the council's views on H.R. 3578, after which he and I will both be available for any questions you might have.

Senator MATHIAS. Without objection, we will insert into the record the written statement of Charles A. Horsky.[1]

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[1] See p. 54

Mr. Harahan.

Mr. HARAHAN. Thank you. Good morning, Senator.

I am Sam Harahan. I am the staff director of the Council for Court Excellence.

Before Charles A. Horsky, president of the council, left for vacation with Barbara—his wife—he asked me to extend his personal appreciation for your holding these hearings and for your interest in the jury bill and in H.R. 3578.

The prepared statement of the council has been made a part of the record, so I will briefly focus on one or two items therein.

I might note our appreciation to Eileen Mayer and Gary Zizka of the majority and minority staffs for working with us over the last year on both of these bills. We very much appreciate their efforts.

With regard to H.R. 3578, the Council for Court Excellence supports passage of this bill and offers today an amendment for your consideration at the end of our prepared testimony to one of the sections, that dealing with the hearing commissioner authorization.

To back up briefly, as you know, many of the sections of the bill are the outgrowth of the D.C. Bar's Horsky committee, and, further, there was a small committee set up by the bar that my colleague here, John Pickering, chairs that resulted in H.R. 3578. It was a lengthy process. We kept winnowing down and winnowing down. I think at some points John Pickering and I thought we would end up with nothing in terms of proposals that reflected the agreement of all parties.

So, that effort is a lengthy one, and Mr. Pickering will speak more about that.

H.R. 3578 really represents the consensus of a breadth of our community. Because my remarks do not focus on many of the sections for which there appears to be general support does not mean any lack of resolve on our part but simply trying to conserve the time of the committee.

With regard to the bill itself, the council's support and comments address sections 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 17, as they deal with the executive officer, reorganization of the auditor-master, elimination of the duplicate judicial financial reporting requirements, certification of questions of law, judicial nomination commission, and the judicial tenure and disability commission.

Regarding the provisions in the bill to permanently authorize hearing commissioners in superior court, the Council for Court Excellence supports the thrust of this section but proposes three amendments which we believe would provide for broader judicial and bar involvement in the appointment procedure, provide hearing commissioners with better position security, and provide for the oversight of the hearing commissioners by the independent Judicial Tenure and Disability Commission which is a presently statutorily created group.

Language to effect these suggested changes appears at the end of our prepared testimony.

Since you have already directed questions to the court with regard to those issues, I don't think it is necessary for me, at this time, to further amplify on those three proposals, except to say that the model that we used in general was the U.S. magistrates'

statute, so that is what we looked at in framing our inquiry into the hearing commissioner area.

I know people will testify later to address in more depth issues with regard to that particular proposal—the hearing commissioners—but at this point I will conclude my remarks and simply turn it over to Mr. Pickering.

Senator MATHIAS. Mr. Pickering.

Mr. PICKERING. Thank you, Senator. I appear on behalf of a committee of the District of Columbia Bar which is charged with implementing the many recommendations of the Horsky committee study. Mr. Horsky and I have worked closely over the years, as Mr. Harahan has indicated, and I simply want to add my thanks to his for your holding these hearings and also for the leadership you took in having the Horsky committee study printed as a Senate document, making it widely available in useful form.

Senator MATHIAS. I am glad we got that done before Gramm-Rudman.

Mr. PICKERING. Yes, indeed.

It has been very useful. Those recommendations have been studied by the judges of the local courts and by the bar committee that I chair.

I want to thank Chief Judge Pryor and Chief Judge Moultrie and also Judge Goodrich of the superior court for the enormous effort that they put into reviewing those recommendations, and they have put many of them into effect administratively.

But there are other pieces of the recommendations that require legislative action. Some could be acted on only by the Congress of the United States. Others, the Council of the District of Columbia can handle.

So, our committee turned to how we might try to get a legislative package through. Mr. Horsky and I extended an invitation to a broad cross-section of people from the executive departments, from the local courts, and from the staffs of congressional committees.

In addition to my prepared statement, I would like to submit for the record—I have already given copies to the staff—a list of the people who were invited to join in that operation which, as Mr. Harahan has said, included Eileen Mayer and Gary Zizka of your staff.[1]

I would also like to have as part of the record a memorandum, dated April 18, 1985, signed by Mr. Horsky and myself setting forth the results of that group's efforts.[2]

Senator MATHIAS. These documents, without objection, will be made a part of the record.

Mr. PICKERING. Thank you, Mr. Chairman.

As reflected in that memorandum that I have just submitted, our informal group came up with 12 legislative recommendations. Eleven of those are included in H.R. 3578. We support those 11. They are the sections which Mr. Harahan has referred to.

I shall speak only to a couple of them. One is section 9 of the bill, the certification-of-law questions.

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[1] See p. 73.
[2] See p. 75.

You asked Chief Judge Pryor whether studies had been made about workload in that connection. We checked with the National Center for State Courts and with the Corporation Counsel's office. The information we obtained was turned over to Chief Judge Pryor and was considered by the court. Chief Judge Pryor, who was a member of our informal group, reported that they had no objection, particularly since it is discretionary jurisdiction with them. They are not required to consider a certified question. They may consider the certified question.

So, I agree with what the Chief Judge indicated. It should not increase their workload.

There is another set of amendments, that is, some sections which I want also to mention, and those are sections 10, 11, and 12 of the bill, dealing with the confidentiality of the work of the Judicial Nomination Commission. What we have recommended and what passed the House and what I think the District of Columbia supports now in these sections is a good bit of a consensus on the proper balance between the public's right to participate in the judicial selection process and the need for confidentiality so that the Judicial Nomination Commission can get the best and the most adequate information to do its job.

We realize that some of what is proposed there might be adopted by the Council of the District of Columbia, but there are other matters that we think, clearly, have to be dealt with by the Congress; and we see no reason to leave this hanging in doubt, so we urge the support of those parts of the bill.

Finally, lawyers are never satisfied with having gotten only 11 out of 12 recommendations. We would like to urge this committee to add one more provision. That is item nine of the memorandum which we have submitted. That would give the Council of the District of Columbia authority to adjust, from time to time, the jurisdictional ceiling for small claims.

The small claims ceiling for the District of Columbia was at $750, as I recall, for almost 20 years. You know what inflation did.

On the recommendation of the Horsky committee, Congress did pass a statute raising the ceiling to $2,000. That is still well below what the ceiling is in neighboring suburban jurisdictions for small claims, and we see no reason why the Congress should have to worry with that essentially local jurisdictional matter.

The original Horsky committee report suggested putting that authority in the courts. After further consideration, we feel that, maybe, the political body is the one best equipped—the legislative arm of the District government—to do that.

That completes my prepared testimony. Our committee has had no position on the jury bill because it was not part of the Horsky study, and we have not studied it. Speaking personally and as a resident of Montgomery County, I think that it is an excellent idea, and I would urge, individually, the taking of favorable action on H.R. 2946, as well.

Thank you, sir.

Senator MATHIAS. Thank you, Mr. Pickering.

Let me just ask the panel generally whether there are any doubts about the ability of the city to support two distinct jury systems.

Mr. PICKERING. I think there is none. In effect, you have that now. It is a common jury system that is serving both courts, and I think and hope that there would be a considerable congruity between the two.

Senator MATHIAS. And is public opinion ready for the 1 day/one trial system?

Mr. PICKERING. I would think so very much. Many of the suburban jurisdictions have that now, and at the time you may remember, Senator, the genesis of the court reorganization bill was the original Gesell then later Ellison committee court management study, which I had the honor to serve on back in the late 1960's. There was no matter involving the court system of the District of Columbia then that came in for more universal criticism than the jury system. It affects all the members of the community. They get exasperated about it. This bill, I think, would be a wonderful step forward in improving the administration of justice.

Ms. GILBERT. I might add that the Council for Court Excellence intends to undertake an extensive public education effort when this bill is passed so that, during the transition period, people will understand what the new system involves; will understand that individuals who have previously been exempt may be called to serve; but also will understand that service under a system, like one trial/1 day, will become a satisfaction and a matter of civic pride, rather than the onerous task it is now.

Senator MATHIAS. On the subject of hearing commissioners I understand the council supports the concept but has some ideas about appointment and tenure and review.

Do you think these matters can be handled by rule of court?

Mr. HARAHAN. Senator, I think a number of the suggestions that Chief Judge Moultrie proffered are really quite appropriate in that direction, for example, the Board of Judges appointment. I think there are other matters requiring further elaboration. I did not understand his point about the two-tier system and how that would address the council's recommendations dealing with the oversight by the Tenure and Disability Commission of their judicial duties. I didn't follow that logic, frankly.

Senator MATHIAS. You don't think it is a two-tier system?

Mr. HARAHAN. I think the hearing commissioner system that is developing in Superior Court is clearly a two-tier system. People, as I said, testifying later from Division VI of the District of Columbia Bar and Professor Broderick can really speak to that more fully than I.

But what I am suggesting is that I don't know how, by court rule, you will be able to deal with issues such as whether hearing commissioners are considered judicial officers, and are they subject to the oversight of the independent tenure commission? The current bill does not address the residency requirement for hearing commissioners. Would that be handled by court rule requiring these people to be residents of the District of Columbia, or would that more properly be the function of a statutory prescription?

Senator MATHIAS. What is the view as to dealing with the currently sitting hearing commissioners, assuming these recommendations were adopted?

Mr. HARAHAN. I think, again, Chief Judge Moultrie's position there is the one we would support, and that is that the rules, as promulgated by the Board of Judges, under such a system would really have to also, obviously, apply to the sitting hearing commissioners. Clearly if this body decided; that is, if Congress decided not to make permanent the hearing commissioners, at least the seven additional hearing commissioners or whatever the number is would be affected by that.

But I think, in general, the Board of Judges' plan or rules would apply to the present hearing commissioners.

I think, with regard to issues such as if you adopted, for example, some of the procedures used in the U.S. courts about having a fixed-term appointment for hearing commissioners, then I think language would have to be offered to address whether the existing hearing commissioners would start today with an appointment of a certain length of time or whether they would be so-called grandfathered in or exactly how you would address that.

Senator MATHIAS. I think that members of the panel are all too well aware that one of the refuges of the Congress from avoiding action is to require further study.

Do you think this subject has been studied enough?

Mr. PICKERING. I should say that our committee has not studied it. I have no desire to study it. I assume, if the bar were asked, it would be another ad hoc group of the District of Columbia Bar. I would think that it would be fairly clearly illuminated by now, both by how close it is to the U.S. magistrates' system and what the views of the court are and of the corporation counsel and the other testimony that you will hear today.

I don't know what really a study could add. There is a legislative history, I think, of the magistrates' experience and so on.

Senator MATHIAS. Well, as your testimony is in the nature of a statement against interest it has special force and effect.

Mr. PICKERING. Yes, I have no desire to study this matter.

Mr. HARAHAN. We don't have any position on the issue per se. Were you to move in that direction, I would certainly hope that you would encourage the consultation with the existing hearing commissioners, for example, who to some extent, I think, feel a little bit out on a limb about their involvement in this whole issue. I think it is important that all elements be consulted, were you to go in that direction.

Senator MATHIAS. Mr. Pickering, you addressed one issue which is not in H.R. 3578, as it came out of the House, which was to include a provision to allow the city council to adjust the small claims jurisdiction.

I think you explained the reasoning behind it very adequately. Do you feel strongly about? It is an issue that the Congress recently looked at.

Mr. PICKERING. Well, it looked at it—when was it?—3 years——

Mr. HARAHAN. October 1984.

Mr. PICKERING. October 1984.

I don't urge that the ceiling be changed at the present time——

Senator MATHIAS. Just give the jurisdiction——

Mr. PICKERING. Just give to the authority so that in the future there could be action by the council if necessary to adjust. I think

it is too soon now to know just what pressure that has been relieved and what pressure that has been created in the superior court by the $2,000 ceiling, because as you increase the jurisdiction of one branch you may relieve some, but you burden others, and the whole thing needs to be looked at, I think, before there is any change in the ceiling.

Senator MATHIAS. I have a lot of sympathy with that view. The workload of the Congress doesn't get any lighter, and the difficulty of attracting congressional attention doesn't get any easier, so I think that makes some sense.

Mr. PICKERING. This has been the real problem. There is nothing earthshaking about any of these legislative proposals, but it was just necessary to try to build the broad consensus to get through things that are needed but are not going to make anyone's reputation.

Senator MATHIAS. Well, we thank each of you for your appearance here today and thank you even more for the work that preceded today. It has been very important, and I hope you will convey to Mr. Horsky our appreciation for his continuing interest in this area.

[The prepared statements of Charles A. Horsky with an attachment, Samuel F. Harahan, and John H. Pickering, with attachments, follow:]

TESTIMONY OF CHARLES A. HORSKY
COUNCIL FOR COURT EXCELLENCE
BEFORE THE SUBCOMMITTEE ON GOVERNMENT EFFICIENCY AND
THE DISTRICT OF COLUMBIA
COMMITTEE ON GOVERNMENT OPERATIONS
U.S. SENATE
CHARLES McC. MATHIAS, CHAIRMAN

MARCH 5, 1986

Senator Mathias, Members of the Committee. My name is Charles A. Horsky, and I am appearing before you as President of the Council for Court Excellence. As you know, the Council is a local civic organization created by a group of concerned citizens from the legal, business, civic and judicial communities in the District of Columbia. Our organizational purposes include fostering better public understanding of the judicial system and promoting reform and improvements in the administration of justice in the local and federal courts in the District of Columbia. We appreciate the opportunity to appear before you today to discuss, and in general to endorse, the provisions of H.R. 3578, the District of Columbia Judicial Efficiency and Improvement Act of 1985, and to urge the Committee to act quickly and with enthusiasm to adopt H.R. 2946, the District of Columbia Jury System Act.

I would like initially to address H.R. 2946, which would allow the courts of the District of Columbia for the first time to establish their own jury system, and which would enable the D.C. Superior Court to adopt a one trial/one day jury service

procedure. For more than two years members and staff of the Council for Court Excellence have worked closely with the leadership of the local and federal courts in the District, with the D.C. Bar, with the business community as represented by the Board of Trade, with the U.S. Justice Department, and with many others to develop a jury service proposal that reflects the needs and interests and that has the support of all segments of our community. H.R. 2946 is the product of unusual care and consultation, and therefore represents to an unusual extent a true consensus. The bill received bipartisan support in the House of Representatives, and we anticipate that it will generate equivalent support in the Senate.

H.R. 2946 should be viewed in the broad historical context of the increasing independence and autonomy of the local courts of the District. Prior to 1971, the D.C. Court of General Sessions had jurisdiction over minor criminal cases and civil matters where the amount in controversy was under $10,000. Authority over the jury system used in that court was vested in the Federal District Court for the District of Columbia. With Congressional passage of the 1970 D.C. Court Reform Act, the Superior Court was created, and over time it assumed jurisdiction over all local civil and criminal cases. The 1970 Act did not, however, transer authority for the jury system to the Superior Court. Today, as was true twenty years ago, the basic legal

authority for our local judicial system's jury plan rests with the federal courts.

We applaud the initiative of the Congress to continue the appropriate transfer of local judicial functions to the District of Columbia. Adoption of this bill will enable the Superior Court, the equivalent of a state court for this jurisdiction, to devise and operate a jury system which is appropriate and responsive to the needs of the District. In that respect, the transfer to the Superior Court of control over its own jury procedures has the full support of the Chief Judge of the U.S. District Court.

H.R. 2946, therefore, is a logical and reasonable continuation in the development of local judicial autonomy. For the Council, however, and for the business and civic groups which have worked to support the bill, it has a special and significant focus. The bill will allow the Superior Court to adopt a one trial/one day jury service procedure, under which the term of jury service will be limited to one day, unless the juror is assigned to a trial that continues beyond that day's end. As you know, the term of jury service has since the mid-1970's been two weeks. At the same time the very broadly defined exceptions and exemptions of the current system, which as a practical matter are inevitable with a two week term, would be eliminated. Under a one trial/one day system all citizens of the District would be

eligible and would be obligated to serve as jurors, but would do so under an efficient, effective system.

The Council for Court Excellence believes that a one trial/one day system would greatly increase citizen participation in our court system, would enhance the satisfactions of jury service, and would result in more broadly representative juries. In the numerous jurisdictions in which this system has been introduced - including Anchorage, Detroit, Baltimore and nearby Montgomery County, Maryland - it has won the support and endorsement of prosecutors, court staff, the private bar, jurors and the general public. We believe that it will be a great addition to the administration of justice in the D.C. Superior Court.

I might also note that the Council for Court Excellence supports adoption of a one trial/one day petit jury system for the United States District Court for the District of Columbia, so that more D.C. residents will have the opportunity to serve as jurors at both the local and federal court level. We may be returning to the Congress on this separate but related initiative in the months ahead.

I would like now to turn my attention to H.R. 3578, the District of Columbia Judicial Efficiency and Improvement Act of 1985. Many of the elements of this bill derive from a lengthly effort of the D.C. Bar to develop needed legislative proposals to improve the functioning of the D.C. Courts. Under the leadership

of a special committee of the Bar chaired by John Pickering of the D.C. Bar, several members of our own Board of Directors have worked closely over the past year with the Office of the Mayor, officials of the local and federal courts, appropriate Congressional committee staff, and others in furtherance of a number of the legislative items contained in H.R. 3578.

Additionally, as you may know, the genesis for a number of the provisions of this bill was an earlier major study of the D.C. Courts by the District of Columbia Court System Study Committee of the D.C. Bar, which I chaired. Over a four year period, this committee studied the effects of the 1970 District of Columbia Court Reform and Criminal Procedure Act, and issued a series of nine reports, which the U.S. Senate was kind enough to print in 1983 as Senate Print 98-34. Most of the legislative proposals before you today originated in that Bar effort as subsequently reviewed, considered, and endorsed by the ad hoc bar committee Mr. Pickering chairs.

I would like to comment on a number of the sections of the bill.

HEARING COMMISSIONERS. Mr. Chairman, we understand and support the underlying need for a permanent authorization for hearing commissioners in the Superior Court of the District of Columbia. We believe, however, that the legislative proposals now before the Committee should be amended in three specific areas: appointment procedure, position security, and

disciplinary procedures. The specific legislative language we suggest to effect these changes is attached to our testimony.

In general, Mr. Chairman, we favor an appointment and position security procedure for the D.C. Superior Court hearing commissioners similar to that provided for U.S. Magistrates under Title 28, U.S.C. Sections 631 and 639. First, we favor adopting a five year fixed term appointment provision similar to that enacted by the Congress for the U.S. Magistrates. Second, we support an appointment and reappointment provision for hearing commissioners in the D.C. Superior Court which would use an independent merit selection panel, composed of members of the bar in private practice before the court and other citizens, to assist the court in identifying the best qualified candidates. Recommendations of the merit selection panel would go to the Board of Judges of the Court, which would have the selection authority. Finally, Mr. Chairman, we recommend that this bill provide that hearing commissioners, as judicial officers hearing a variety of matters as specified in D.C. Code 11-1732 and elsewhere, be subject to the judicial discipline and conduct regulations and oversight of the Canons of Judicial Ethics and of the D.C. Judicial Disabilities and Tenure Commission, just as the Congress earlier provided for all other judicial officers in the Superior Court.

The reasons for our proposed amendments concerning hearing commissioners are several. First, regarding the method of appointment of hearing commissioners, the existing bill provides that the chief judge of the Superior Court will appoint and remove these individuals. The procedures adopted by the U.S. Congress regarding the appointment and screening of candidates for positions as U.S. Magistrates, as outlined above, would in our judgment better contribute to overall public confidence in the judicial system. We are also concerned that hearing commissioners currently serving in the Superior Court may lack civil service safeguards, such as are provided as a matter of course to other D.C. Superior Court staff. A fixed appointment term of sufficient duration, such as five years, would assure that this important segment of the court family is not inadvertently or unfairly penalized with respect to job security and personnel matters. At the same time we recognize that a fixed term can be a problem under certain circumstances, and would provide for a one year probationary period, with removal during such period at the discretion of a majority of the appointing judges.

Finally, with regard to the issue of authority over the conduct of hearing commissioners, we suggest that as quasi-judicial officers it is appropriate that these individuals be subject to the authority of the D.C. Judicial Disabilities and Tenure Commission. I might note that the Center for Judicial

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Conduct Organization has indicated that the practice in this area in most other states is that court employees who exercise judicial functions on a full-time basis normally fall within the jurisdiction of the independent judicial conduct agency. As noted above, suggested legislative language to effect the above recommendacions regarding hearing commissioners is attached to our testimony.

APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS

The Council supports the proposed changes in District of Columbia Code 11-1703. Section 4 of this bill is consistent with recommendations in the Court Organization Report of the D.C. Bar's D.C. Court System Study Committee. I should also note that the D.C. Superior Court Board of Judges favors this notion of local judicial discretion and responsibility for selection of the D.C. Courts' administrator.

REORGANIZATION OF AUDITOR MASTER RESPONSIBILITY

The Council supports the provisions of Section 7. In large degree this reorganization has effectively been accomplished earlier through action of Superior Court Chief Judge Moultrie. The proposed section is necessary to bring the practice and the underlying legislative authorization in line with each other. Also, these issues have been focused on and agreed to by both D.C. Bar committees and the D.C. Superior Court Board of Judges.

JUDICIAL FINANCIAL REPORTING REQUIREMENTS

Section 8, though modest in language, has important workload implications for both a federal judicial review committee and for our D.C. Courts' judges. We strongly support the intent of this Section, which would eliminate the duplicate financial reporting filing requirement to which judges of the Superior Court and the D.C. Court of Appeals are now subjected. D.C. Courts' judges would continue to be subject to the reporting requirements of the D.C. Judicial Disabilities and Tenure Commission but would be relieved of the necessity of filing largely duplicative financial disclosure information each year with the federal judicial review committee as well.

CERTIFICATION OF QUESTIONS OF LAW

The Council supports Section 9 of H.R. 3578 which authorizes the D.C. Court of Appeals to answer questions certified to it by federal and state appellate courts. Twenty-four states have enacted this uniform law since it was adopted by the National Conference of Commissioners on Uniform State Laws in 1967, and we favor its enactment in the District as another indication of the increased autonomy of the District of Columbia Courts, and in the interests of judicial economy.

D.C. JUDICIAL NOMINATION COMMISSION

With regard to Sections 10, 11, 12, and 17 of H.R. 3578, the Council supports the several proposed changes in the

Judicial Nomination Commission's processes. We believe the values of public access provided for by the D.C. Freedom of Information Act must be balanced with the need for the D.C. Judicial Nomination Commission to receive and consider confidential information for decision-making purposes at each stage of the judicial nomination process. The reforms proposed will ensure the necessary protections to render the selection process more effective, and allow for public input at the appropriate stages of judicial nominations. Both the D.C. Court System Study Committee and the D.C. Bar Courts Study Implementation Committee concur on these issues. The Board of Judges of the D.C. Superior Court supports the first two proposals, and has voiced no opinion on the proposal to announce judicial nominations publicly at the time they are sent to the President. Section 17 will assist the judicial selection process by giving the Judicial Nomination Commission necessary time to consider prospective candidates.

D.C. JUDICIAL DISABILITIES AND TENURE COMMISSION

The Council for Court Excellence supports amendment of the D.C. Code as proposed in Section 13 to give the Tenure Commission and the D.C. Judicial Nomination Commission greater flexibility to share information regarding judges between the two groups. In addition, we support Section 14 which advances from three months to six months the time required for judges to notify the Tenure Commission regarding their intent with respect to an additional fifteen year term.

Finally, Section 15 of the Bill provides a much needed refinement in the existing statutory judicial reappointment evaluation categories. The existing judicial reappointment categories used by the Tenure and Disability Commission do not appear after more than ten years of experience to have accomplished what the Congress intended. The proposal now before the Committee in this regard is in our view an appropriate remedy to an unnecessary and potentially divisive evaluation standard for reappointing judges.

Mr. Chairman, this concludes the prepared statement of the Council for Court Excellence.

PROPOSED AMENDMENTS

11-1732. Hearing Commissioners

(a) The judges of the D.C. Superior Court shall appoint hearing commissioners who shall serve in the Superior Court and shall perform the duties enumerated in subsection (d) of this section and such other duties as are consistent with the Constitution and laws of the United States and of the District of Columbia, and are assigned by rule of the Superior Court. The appointment shall be by the concurrence of a majority of all judges in active service on the Superior Court. Absent concurrence of a majority of the judges in active service, appointment shall be by the Chief Judge of the Superior Court.

(b) Hearing commissioners shall be selected pursuant to standards and procedures approved by the Superior Court Board of Judges which shall contain provision for public notice of all vacancies in hearing commission positions and for the establishment of a merit selection panel, composed of lawyer and non-lawyer residents of the District of Columbia who are not employees of the Court, to assist the Court in identifying and

recommending persons who are best qualified to fill such positions.

(c) No individual may be appointed or serve as a hearing commissioner under this section unless he or she has been a member of the Bar of the District of Columbia for at least three years.

(d) A hearing commissioner may perform the following functions: [same as subsections under original paragraph (c)]

(e) The appointment of any individual as a hearing commissioner shall be for a term of five years which shall include a one-year probationary period. Removal of a hearing commissioner during the one-year probationary term shall be within the discretion of the appointing judges where a majority of said judges concur in the order of removal.

(f) Hearing commissioners shall be subject to the provisions of 11 D.C. Code 1521-1530 (1981 ed. as amended) governing the authority of the D.C. Commission on Judicial Disabilities and Tenure to suspend, remove or retire a judge and shall abide by the Canons of Judicial Ethics.

Testimony of Samuel F. Harahan, Executive Director, Council for Court Excellence before U.S. Senate Subcommittee on Govewrnmental Efficiency and the D.C., Charles Mcc. Mathias, Chairman. Testimony concerns H.R. 3578 D.C. Judicial Efficiency and Improvement Act, and supplements prepared statement of Charles A. Horsky, Council President.

Mr. Chairman, my name is Samuel F. Harahan, and I appear here today representing Charles A. Horsky, President of the Council for Court Excellence. As Mrs. Gilbert has stated Mr. Horsky is out of the City on vacation with his wife Barbara. Mr. Horsky asked me to convey his personal appreciation for the interest of the Chair in the D.C. Jury Bill, H.R. 2946, and in the D.C. Judicial Efficiency and Improvement Act, H.R. 3578.

The prepared statement of the Council for Court Excellence on these two bills has already been submitted for the record, and with the Committee's leave I will focus briefly on one or two items within H.R. 3578. Mr. Chairman before comemnting on any scetion of the D.C. Judicial Efficiency and Improvement Act may I convey our thanks to the able Majority and Minority staffs of this Subcommittee, Eileen Mayer and Gary Zizka, for working with the Council for Court Excellence and the D.C. Bar the D.C. Courts, and others over the past year or more on the proposals now before this Committee.

Turning to H.R. 3578, Mr. Chairman the Council for Court Excellence supports passage of this bill and offers today amendment for your consideration at the end of our prepared testimony to one of the sections dealing with the hearing commissioner authorization.

To back up very briefly, as you know many of the sections of this bill are the outgrowth of a lengthy procedural study of the D.C. Courts in the context of the 1970 D.C. Court Reform Act, which was conducted between 1978 and 1982 with the full cooperation of the D.C. Courts by the D.C. Bar. Mr. Horsky chaired that effort, and this Committee graciously consented to print the final report as Senate Print 98-34.

Subsequent to the completion of the Horsky Report the D.C. Bar sought to assist with the consideration of the many recommendations. As Mr. Pickering's testimony this morning notes most of the individual sections of H.R. 3578 are the result of a lengthy review effort of a broadly based group of people from the bar, the courts, the executive and legislative branches of the D.C. and federal governments. The Council for Court Excellence is most appreciative of the opportunity to be a part of that committee effort under Mr. Pickering's leadership.

As Mr. Horsky's prepared remarks state, the Council for Court Excellence supports Sections 4,7,8,9,10,11,12,13,14,15, and 17 of H.R. 3578 as they affect the following areas of judicial administration: the Executive Officer of the D.C. Courts,reorganization of the Auditor-Master, elimination of duplicate judicial financial reporting requirements,certification of questions of law,the judicial nomination commission, and the judicial tenure and disability commission.

Regarding the provisions in the bill to permanently authorize hearing commissioners in the D.C. Superior Court, the Council supports the thrust of this section, but proposes three amendments which we believe would provide for broader judicial and bar involvement in the appointment procedure; provide hearing commissioners with better position security; and provide for oversight of the hearing commissioners by the independent Judicial Disability and Tenure Commission. Language to affect these suggested changes appear at the end of our prepared testimony.

Mr. Chairman, this concludes the brief remarks I have regarding the Council's position on H.R. 3578. We hope this Committee will endorse a form of this bill and work for full congressional passage without delay.

Thank you.

TESTIMONY OF JOHN H. PICKERING, CHAIRMAN
D.C. BAR COURTS STUDY IMPLEMENTATION COMMITTEE
BEFORE THE SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA OF THE
COMMITTEE ON GOVERNMENTAL AFFAIRS,
UNITED STATES SENATE

Charles McC. Mathias, Jr., Chairman

March 5, 1986

Mr. Chairman, Members of the Committee, I am pleased to appear before you this morning in general support of H.R. 3578. My formal testimony is on behalf of the District of Columbia Courts Study Implementation Committee of the District of Columbia Bar, which I chair.

H.R. 3578 contains a number of provisions which will help strengthen and improve the functioning of the District of Columbia court system. While I will address myself more directly to several sections of the bill, I believe it is important for the record to reflect that many of the proposals in H.R. 3578 emanate from the major four year evaluation study of the District of Columbia Courts by an ad hoc committee of the District of Columbia Bar, which Charles A. Horsky chaired. The final report of tnat study was printed by your subcommittee in April, 1983, as Senate Print 98-34. We are grateful, and welcome this opportunity to thank you for this printing which made this important study of the District's court system widely available.

As you know, the Horsky Committee study made numerous recommendations for improvement in the District's court system. Each of the studies comprising the report was reviewed by the judges of the D.C. Courts, and also by the Bar committee which I chair. That Committee is concerned with facilitating the implementation of the various recommendations resulting from the study. I am pleased to report that many of the recommendations have been implemented administratively by the D.C. Courts themselves. We are particularly appreciative of the time and attention given by Chief Judge H. Carl Moultrie I and Judge George Goodrich, who chaired the Superior Court's Committee to review the many recommendations of the Horsky Study.

Finally in the way of opening remarks, I should also note that over the past two years the Bar Committee which I chair has been participating with the Council for Court Excellence and with an informal group of representatives of the local judiciary and court administration, the Executive Branch of the D.C. Government, the U.S. Attorney for the District, committee staff from the cognizant Congressional committees, including this subcommittee, and others to study and determine the necessity of legislative action on a number of the court improvement recommendations of the Horsky Study that are before this subcommittee in H.R. 3578.

A list of the persons invited to participate in this informal group, most of whom did so, has been submitted with my statement, and I ask that it be inserted in the record. The work of this group resulted in a general consensus on 12 legislative proposals which are explained in a memorandum dated April 18, 1985. Copies of that memorandum have been furnished to the subcommittee and I request that it also be made part of the record of this hearing.

We are pleased that H.R. 3578 incorporates 11 of our 12 legislative proposals. This is done in Sections 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 17 of the bill. Our Bar Implementation Committee supports and endorses these sections and urges their enactment. I shall not discuss these sections in detail since the background and need for each is fully explained in the memorandum I have submitted. Instead I want to note my agreement with what the Council for Court Excellence has said about these sections, and to comment briefly on a few of them:

Section 9

Section 9 of the bill provides for certification of questions of law. It is patterned after the Uniform Certification of Law Act, 12 U.L.A. 52 (1975), which has been adopted by statute or court rule in twenty-four states. The need for it was suggested by the Legislative Committee of Division IV of the D.C. Bar as the result of inquiries from the U.S. Court of Appeals for

the D.C. Circuit. It would permit the U.S. Court of Appeals, any other U.S. Court of Appeals, the U.S. Supreme Court, and the highest court of any state to certify questions of District of Columbia law to the D.C. Court of Appeals which would have discretion to act on the certification. Adoption of this proposal by the Congress would provide a means for obtaining authoritative resolution of undecided questions of D.C. law that may be determinative of proceedings pending in the certifying court. Information supplied by the National Center for State Courts and the Corporation Counsel's office indicates that this provision would not be used often and would not burden the District of Columbia Court of Appeals. That Court agrees and has no objection to the proposal.

Sections 10, 11 and 12

These three sections represent a consensus on the proper balance between the public right to participate in the judicial selection process and the need for confidentiality so the Judicial Nomination Commission can get the best and most adequate information to do its job. We realize that some parts of these proposals might be adopted by the Council for the District of Columbia. However, as explained in the memorandum I have submitted, there is doubt that the Council could do all that is needed, so Congressional action is proposed.

While we are pleased that 11 of our 12 proposals are included in H.R. 3578, we are disappointed that one is not. We urge the subcommittee to include it also. It is Item 9 of the memorandum I have submitted. It would give the Council of the District of Columbia authority periodically to adjust the jurisdictional ceiling for small claims. This would give desirable flexibility, would relieve Congress of the need to legislate on an essentially local matter, and is in line with how the matter is handled in neighboring jurisdictions.

Mr. Chairman, this completes my formal statement. I will be glad to answer any questions the subcommittee may have.

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April 18, 1985

DISTRICT OF COLUMBIA JUDICIAL
IMPROVEMENTS ACT OF 1985

Attached are a series of legislative proposals which could form the District of Columbia Judicial Improvements Act of 1985. These proposals generally implement legislative recommendations of the Horsky Committee Study that require Congressional action. They have been developed with the help of an informal legislative group. While none of them are major, together they will help strengthen and improve the functioning of the District of Columbia court system.

A brief description follows of the Horsky Committee Study, of the informal legislative group, and of the proposals themselves.

Horsky Committee Study

In 1978 the District of Columbia Bar established the District of Columbia Court System Study Committee under the chairmanship of Charles A. Horsky. That Committee was charged

with assessing the effect of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (84 Stat. 473), and with making "such recommendations as are warranted for further improvement in the court system of the District."

The Committee conducted a massive study and issued nine reports which are commonly referred to collectively as the Horsky Committee Study. One report, on court organization, dealt with problems common to both the District of Columbia Court of Appeals and the Superior Court. One report dealt with the Court of Appeals. The other seven reports addressed the various branches of the Superior Court.

The entire Study, consisting of the nine reports, was printed as a committee print in April 1983 by the Subcommittee on Governmental Efficiency and the District of Columbia of the Senate Committee on Governmental Affairs, S. Prt. 98-34.

The Horsky Committee Study makes numerous recommendations. They have been reviewed by the D.C. courts and by a committee of the D.C. Bar appointed for implementing those recommendations. Many of those recommendations can be, and have been, implemented by the courts themselves. Others require legislative action either by the Congress or by the Council of the District of Columbia.

The Informal Legislative Group

An informal legislative group was created at the invitation of the Council for Court Excellence and the Bar's Committee for the Implementation of the Horsky Committee Study. The purpose was to formulate a set of legislative proposals implementing recommendations of the Horsky Committee Study on which there seems to be general agreement and to get support for enactment.

The informal group has consisted of majority and minority staff representatives from the cognizant House and Senate committees, representatives of the Council of the District of Columbia and its Judiciary Committee, representatives of the Mayor's office and the Corporation Counsel, the United States Attorney, the Chief Judges of the D.C. courts and the Executive Officer of the D.C. courts, the Executive Director of the D.C. Bar and representatives of Divisions 2, 4 and 6 of the Bar and of the Bar's Implementation Committee, and representatives of the Council for Court Excellence.

The group has had six meetings and has considered various of the Horsky Committee Study legislative recommendations. No votes have been taken and none of the individuals or entities represented on the group are bound in any way. However, the attached proposals are what has emerged as more or

less of a consensus deserving of support. While they were being developed, recommendations dealing with retired judges and the jurisdictional limit for small claims were partially implemented by enactment of Public Law 98-598.

The Legislative Proposals

The legislative proposals follow, numbered as Items No. 1 through 12. The first ten items are from the Horsky Committee Study. In each of those ten items there is reference to the particular Horsky Committee Study recommendation involved, suggested legislative language, and an explanation of the purpose of the proposal.

The last two items -- Nos. 11 and 12 -- did not result from the Horsky Committee Study. They arose during the group's consideration and were believed to warrant inclusion in the package. Like the other items, these two proposals contain suggested legislative language and an explanation of the purpose of the proposal.

As will be apparent, none of the proposals is major. Similarly, none of them is believed to be controversial; in the course of the work of the group, several recommendations were eliminated as either controversial or unnecessary. Taken together the attached proposals should help improve and

strengthen the functioning of the court system of the District of Columbia. It is hoped that they can be combined and made the nucleus of a bill which could be the District of Columbia Judicial Improvements Act of 1985.

If further information is desired about these proposals contact either Sam Harahan of the Council for Court Excellence (783-7736) or John H. Pickering, Chairman of the Bar's Implementation Committee (872-6200).

Charles A. Horsky, Chairman
Council for Court Excellence

John H. Pickering, Chairman
D.C. Courts Study Implementation Committee, D.C. Bar

ITEM NO. 1

Recommendation No. 5 of the Court Organization Report*/

- Eliminating the requirement that the Executive Officer of the D.C. Courts be appointed from a list of persons submitted by the Director of the Administrative Office of the United States Courts.

Amendment

Section 1703(b) of title 11 of the District of Columbia Code is amended to read as follows:

(b) The Executive Officer shall be selected by, and subject to removal by, the Joint Committee on Judicial Administration with the concurrence of the respective chief judges. The Joint Committee shall consider experience and special training in administrative and executive positions, and familiarity with court procedures. The judges may consult with the Director of the Administrative Office and with the Commission on Qualifications of Federal Circuit Executives, for the purpose of obtaining the names of qualified candidates; however, the judges shall not be limited to choosing among the candidates suggested by the Director or the Commission.

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*/ This and similar references are to recommendations in the indicated reports of the District of Columbia Bar's D.C. Court System Study Committee published as a Senate Committee Print, S. Prt. 98-34, and commonly referred to as the Horsky Committee Study.

Purpose

This amendment implements Recommendation No. 5 of the Court Organization Report; it is supported by the D.C. Superior Court Board of Judges.

This amendment alters the present method of selecting an Executive Officer for the D.C. Courts. The Executive Officer is responsible for the administration of the District of Columbia Court System, subject to the supervision of the Joint Committee and the Chief Judges. Currently, the Executive Officer must be chosen from among a list of candidates put forward by the Director of the Administrative Office of the United States Courts. This amendment vests the choice in the hands of the Joint Committee on Judicial Administration, with the concurrence of both Chief Judges. The Judges' choice is no longer restricted to candidates suggested by the Director, although they are free to consult with him and with the Commission on the Qualifications of Federal Circuit Executives. The criteria listed in the statute are advisory; they are the same as the criteria set forward in the statute dealing with the qualifications of federal circuit executives. 28 U.S.C. 332(f).

The change is intended to alleviate problems which have become apparent in the present system by giving the local judiciary more discretion in their choice and a greater responsibility for that choice.

The D.C. Superior Court Board of Judges considers this scheme for selection more appropriate than the current system. The selection of a Court Executive is essentially a local matter. Now that the position of court administrator has become more prevalent across the country, it is no longer necessary to depend on the federal system for the selection of an executive for the D.C. Courts. The District of Columbia Court System, as an independent branch of government, is entitled to make its own judgments in filling this position.*/

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*/ For additional explanation see pp. 814-18 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 2

Recommendation No. 18 of the Court Organization Report

- Grants the D.C. Judicial Nomination Commission 60 days to nominate candidates for judicial vacancies.

Amendment

That section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 be amended by replacing the word "thirty" with the words "sixty calendar."

In its amended form the provision would read [amendment in brackets]:

(d)(1) In the event of a vacancy in any position of judge of a District of Columbia Court, the Commission shall, within [sixty calendar] days following the occurrence of such vacancy, submit to the President, for possible nomination and appointment . . . .

Purpose

The purpose of the amendment is to allow the D.C. Judicial Nomination Commission more time to complete its nomination tasks. The amendment implements Recommendation No. 18 of the Court Organization Report of the Horsky Committee Study. The Committee expressed "concern about the adequacy of the screening and recommendation process

performed within the existing 30 day authorized period." Moreover, the Committee found this concern expressed repeatedly in interviews conducted while preparing its report. A 30-day period is especially troublesome when more than one vacancy occurs and all the nominations must be reported within 30 days. This difficulty was expressly recognized in the recent enactment creating seven new Superior Court judgeships, which included a provision allowing ninety days for the Judicial Nomination Commission to act. Pub. L. No. 98-235 (Mar. 19, 1984). Representative Dymally described the problem as follows:

> Because in 1981 there were three investigators and now with an increased workload, they only have two investigators. The last time they were faced with this problem they had a tremendous problem which called for a supplemental appropriation to expedite the process. It was felt that the 90 days will give them enough time to do a thorough investigation and submit to the President the best nominees there are. That is basically it. It is not to delay the process, but simply to give them enough time, with limited staff to submit to the President the best candidates that there are in the district.

130 Cong. Rec. H779 (daily ed. Feb. 22, 1984). The amendment also includes the term "calendar days" to avoid ambiguity with "business days."

The D.C. Superior Court Board of Judges agrees with the recommendation.*/

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*/ For additional explanation, see pp. 850-51 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 3

Recommendation No. 21 of the Court Organization Report

- Restrict access to materials of Judicial Nomination Commission.

Amendment

Substitute for the last sentence of section 434(c)(3) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 the following:

Materials furnished to or developed by the Commission during the selection process shall be treated as privileged and confidential, and hereby are exempt from the D.C. Freedom of Information Act of 1976 and the federal Freedom of Information Act.

ITEM NO. 4

Recommendation No. 22 of the Court Organization Report

- Clarify exemption of D.C. Judicial Nomination Commission from public meeting requirement.

Amendment

Amend section 434(c) of the District of Columbia Self-Government and Governmental

Reorganization Act of 1973 to add a new subparagraph (4) reading:

(4) Meetings of the Commission may be held in private; the Commission is exempt from public meeting requirements of the District government including Section 742 of this Act.

ITEM NO. 5

Recommendation No. 23 of the Court Organization Report

- Provide that judicial candidate recommendations be announced publicly when forwarded to the President.

Amendment

Amend the first sentence of section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 to read [amendment in brackets]:

In the event of a vacancy in any position of judge of a District of Columbia court, the Commission shall, within [sixty calendar days] following the occurrence of such vacancy, submit to the President, for possible nomination and appointment, a list of three persons for each vacancy. [At this time, the Commission

shall announce publicly the names of those persons recommended by the Commission so that the public may have an opportunity to submit comments on the recommendations to the President.]

Purpose

The amendments to the District of Columbia Self-Government and Governmental Reorganization Act of 1973 resulting from Recommendations Nos. 21, 22 and 23 of the Court Organization Report all address the selection process of the D.C. Judicial Nomination Commission. Currently, the judicial selection process in the District of Columbia lacks protections that would render the process more effective. In structuring the procedure for choosing D.C. judges, however, the values of full public access, and government in the "sunshine" must be balanced against the need for the Nomination Commission to receive essential information regarding prospective nominees in the strictest confidence. This balance will ensure fair and effective decisionmaking while providing public comment and scrutiny at the appropriate stages of the process. The Board of Judges of the Superior Court supports the first two recommendations and has no opinion on the third.

1. With respect to the first amendment, it

is important to appreciate that the Nomination Commission performs, in part, a merit review function. The Commission screens and identifies nominees for judicial office on the basis of merit prior to selecting for nomination among the qualified candidates. To ensure open and candid discussion of judicial candidates, it is necessary to restrict access to materials furnished to or developed by the Commission during the selection process. District government laws and regulations presently are unclear as to the applicability of the local and federal Freedom of Information Acts to the procedures of the Commission. This amendment clarifies existing law by providing a statutory exemption to the Federal and D.C. Freedom of Information Acts. With this amendment, information about potential judicial nominees will be submitted with greater confidence as to its confidentiality.

The drafters were not unsympathetic to the concern that the interested public have ample opportunity for input at the Nomination Commission level. However, we were concerned that many candidates well qualified for judicial office would refuse to be considered for nomination absent confidentiality. Further, there is also concern that some sources may be reluctant to speak candidly about judicial candidates to the Nomination Commission absent confidentiality.

The Judicial Nomination Commission has an

affirmative responsibility, which should be underlined, to seek information about prospective candidates from all quarters of the community. Lengthening the period for completing the nomination process will enable the Nomination Commission to do so and to consider more fully community views about prospective candidates. Members of the community with comments concerning prospective judicial nominees should feel less constrained in presenting their views under the proposed amendment. In short, this first amendment would enhance the quality of the process in the initial stages by removing the chilling effect of open access to information obtained and generated by the Commission.

2. Similarly, the second amendment (Recommendation No. 22, to clarify the exemption of the Judicial Nomination Commission from public meeting requirements) reflects the policy that secrecy of proceedings and deliberation at the Judicial Nomination Commission stage ensures more candid and open debate over the potential candidates. Those with views about the suitability of judicial candidates, as well as the candidates themselves, are better served by proceedings conducted outside the public eye. Again, with this amendment, exchange within the Commission will escape the inhibiting effects of close public scrutiny and should result in more productive dialogue.

The ad hoc legislative group recognized that the effect of item No. 3 regarding the District of Columbia Freedom of Information Act could be accomplished by the Council of the District of Columbia amending that act. Moreover, it is arguable (although not clear) that the Council also could accomplish Item No. 4. These amendments are nevertheless being recommended to the Congress since it alone can amend section 434 of the Self-Government Act and there is no doubt regarding Congress's ability to reform section 742 of that Act. Accordingly Items Nos. 3 and 4 have been fashioned to complement any initiative the Council may take to amend the District of Columbia Freedom of Information Act or section 742 of the Self-Government Act. The scope of the current group of legislative proposals is aimed at the Congress. When the ad hoc legislative group undertakes future recommendations for the Council's consideration, of course, any elements of Items Nos. 3 and 4 which remain pending and within the jurisdiction of the Council can be proposed fresh at that time.

3. The final amendment (public announcement of nominees) addresses the need to ensure a mechanism for public knowledge of the results of the judicial nominating process. The revision requires the Commission to announce publicly the names of those persons recommended by the Commission at the time it submits the names to the President. This change will ensure that those persons with views about judicial nominees have the opportunity to present their views to the President in a timely manner. Presently, the public is dependent upon learning the names of judicial nominees from the media or other secondary sources. Since the President selects the judges from the list of nominees, this amendment seeks to encourage public input into the procedure.

For additional explanation of these three proposals see pp. 853-55 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 6

Recommendation No. 26 of the Court Organization Report

- Authorizing the D.C. Judicial Disability and Tenure Commission, in its discretion, to disclose to the D.C. Judicial Nomination Commission information which it may possess relating to any judge under consideration by the Commission for elevation to the Court of Appeals or to the office of chief judge.

Amendment

Section 1528 of title 11 of the District of Columbia Code is amended by:

(1) relabeling current paragraph (b) as paragraph (c);

(2) inserting a new paragraph (b), which reads:

The Commission shall have the authority, in its discretion, to provide the District of Columbia Judicial Nomination Commission with any information which it may possess relating to any judge under consideration by the Nomination Commission for elevation to the Court of Appeals or to the office of Chief Judge.

Purpose

This amendment implements Recommendation No. 26 of the Court Organization Report, which is supported by

the Superior Court Board of Judges. The amendment alters Section 1528 to provide that the D.C. Judicial Disability and Tenure Commission may, in its discretion, provide the D.C. Judicial Nomination Commission with information which it may possess relating to any judge under consideration by the Nomination Commission for elevation to the Court of Appeals or to the office of chief judge. The amendment is not intended to alter the basic principle of the section that records of proceedings before the Disability Commission are privileged and confidential. However, when one investigatory commission of the D.C. judicial system possesses information relevant to an ongoing consideration by another investigatory commission, it is appropriate that records material to the fitness of the candidate be shared.*/

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*/ For additional explanation see p. 857 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 7

Recommendation No. 28 of the Court Organization Report

- To require judges seeking reappointment to state their intention for additional term 180 days before term expires.

Amendment

That Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 be amended by replacing the words "three months" with the words "six months" and the words "thirty days" with the words "sixty calendar days."

In its amended form the provision would read [amendment in brackets]:

(c) Not less than [six months] prior to the expiration of his term of office, any judge of the District of Columbia courts may file with the Tenure Commission a declaration of candidacy for reappointment. If a declaration is not so filed by any judge, a vacancy shall result from the expiration of his term of office and shall be filled by appointment as provided in subsections (a) and (b). If a declaration is so filed, the Tenure Commission shall, not less than [sixty calendar days] prior

to the expiration of the declaring candidate's term of office, ...

Purpose

The purpose of this amendment is to allow a longer period of consideration for judicial reappointments by both the Tenure Commission and the President. The amendment implements Recommendation No. 28 of the Court Organization Report of the Horsky Committee Study. That D.C. Bar Study found that "[b]y all accounts, including a review of the Commission's Annual Report, the 90-day notice period is insufficient to enable the Commission to conduct its investigations and formulate a Commission recommendation on a sitting judge. This situation is particularly exasperating when several judges come up for reappointment at the same time." In addition, the Bar Study found that currently the Tenure Commission requests that judges voluntarily declare their intention six months before their terms expire.*/

The D.C. Superior Court Board of Judges agrees with this recommendation.

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*/ For additional explanation see pp. 862-63 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 8

Recommendation No. 29 of the Court Organization Report

- To eliminate judicial reappointment evaluation category of "exceptionally well-qualified".

Amendment

That Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 be amended by removing the words "exceptionally well-qualified or."

In its amended form, the provision would read [amendment in brackets]:

> If the Tenure Commission determines the declaring candidate to be [] well-qualified for reappointment to another term, then the term of such declaring candidate shall be automatically extended. . . .

Purpose

The purpose of the amendment is to remove an unnecessary and potentially divisive evaluation standard for reappointing judges. The amendment implements Recommendation No. 29 of the Court Organization Report of the Horsky Committee Study which found "little value in retaining the two automatic reappointment categories for

evaluating judges' performance." In fact, the designation has no effect on reappointment. Under the current version of the statute, it makes no difference whether a judge is rated as "exceptionally well-qualified" or simply "well-qualified."

The Horsky Committee Study also found that only a small number of Superior Court judges were designated as "exceptionally well-qualified" while "virtually every appellate judge" has been rated "exceptionally well-qualified." The Study concluded that the distinction was based on the relative lack of difficulty of assessing the productivity and qualification of appellate judges as opposed to trial judges.*/

The D.C. Superior Court Board of Judges agrees with the recommendation.

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*/ See pp. 863-64 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 9

Recommendation No. 30 of the Statutory Courts Report

- To give authority to periodically adjust small claims ceiling.

Amendment

Amend Section 1321 of title 11 of the District of Columbia Code to read [amendment in brackets]:

> The Small Claims and Conciliation Branch has exclusive jurisdiction of any action within the jurisdiction of the Superior Court which is only for the recovery of money, if the amount in controversy does not exceed $2,000, exclusive of interest, attorney fees, protest fees, and costs. [The Council of the District of Columbia is hereby authorized to review and to change the jurisdictional amount by legislation from time to time.]

Purpose

The recently enacted Public Law 98-598 raised the D.C. Superior Court's small claims jurisdiction from $750 to $2,000. That substantially carried out Recommendation No. 29 of the Statutory Courts Report of the Horsky Committee Study. It was the first increase in the Court's

statutory jurisdiction over small claims since 1970, a fourteen year period. (The neighboring jurisdictions presently have higher jurisdictional limits for their courts equivalent to the D.C. Small Claims Branch -- $5,000 in Fairfax County, Virginia, and $10,000 in Montgomery and Prince George's Counties, Maryland.) The new $2,000 ceiling for the D.C. Small Claims Branch has resulted in an immediate rise in the caseload of this Branch, and should enable many citizens and businesses with small civil cases to have their disputes adjudicated more quickly than before.

The amendment now proposed has as its basis Recommendation No. 30 of the Statutory Courts Report of the Horsky Committee Study. The Horsky Committee Study had recommended legislation allowing the Superior Court to change the jurisdictional ceiling periodically (see p. 700, S. Prt. 98-34), and the Superior Court Board of Judges agreed with that recommendation. It is arguable, however, that the legislative process of the Council of the District of Columbia may be better suited to resolving the various considerations involved in periodically revising the jurisdictional ceiling. Accordingly, the amendment would have the Congress delegate legislative authority to amend the D.C. small claims ceiling to the Council of the District of Columbia.

ITEM NO. 10

Recommendation No. 8 of the Probate Court Report

- To integrate, statutorily, the Auditor Master's office within the Probate Division of the D.C. Superior Court.

Amendment

This amendment would carry out the Horsky Committee Study recommendation for merging the audit staffs of the Auditor-Master and the Register of Wills in the Probate Division.

Section 1724 of title 11 of the District of Columbia Code is amended by omitting the phrase "(1) audit and state fiduciary accounts" and by renumbering the remaining clauses as (1) and (2).

As so amended Section 1724 would read in pertinent part:

> There shall be an Auditor Master of the Superior Court who shall (1) execute orders of reference referred by the Superior Court and perform duties in accordance with Rule 53 of the Federal Rules of Civil Procedure or other applicable rule, and (2) perform such other functions as may be assigned by the Superior Court. . . .

Section 2104 of title 11 of the District of Columbia Code is amended by deleting the word

"and" at the end of subsection (a)(2), by striking the period at the end of subsection (a)(3) and replacing the same with a semicolon and the word "and", and by adding the following new phrase at the end of subsection (a): "(4) audit and state fiduciary accounts."

Purpose

At the time of the D.C. Bar study of the Superior Court, the Auditor-Master was conducting audits and preparing audit reports for the Superior Court on all fiduciary accounts other than probate and guardianship accounts. He also audited those trust accounts remaining in U.S. District Court. The office of the Register of Wills, in the Probate Division, handles the accounts of decedents' estates and guardianship.

The Horsky Committee Study noted that the Auditor-Master's office had developed a substantial backlog of accounts, while, at the time of the Study, the Register of Wills office was up-to-date. The Study concluded that "it is inappropriate for the Auditor-Master of the D.C. Superior Court to continue to serve the U.S. District Court in matters of reference and account."

The amendment removes the requirement that the Auditor-Master audit and state fiduciary accounts and

authorizes the Register of Wills to perform that function. The Horsky Committee Study also recommended that the Superior Court should "merge the regular audit staffs of the Auditor-Master and the Register of Wills under a consolidated Probate Division." The amendment makes that merger possible with the efficiency the Study believed would result.*/ In fact the merger has taken place and the statutes should be changed to reflect the fact.

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*/ For a more detailed explanation see pp. 764-68 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 11

Proposal to eliminate unnecessary duplication of financial reporting*/

Amendment

Amend Section 303 of the Ethics in Government Act of 1978, 28 U.S.C. app. section 301 (1982) by adding subsection (e):

(e) With respect to the judicial officers and employees of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals, the District of Columbia Judicial Disabilities and Tenure Commission shall perform the functions of and have the same authority as the Judicial Ethics Committee of the Judicial Conference of the United States under this title.

Purpose

Presently the judges of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals are required to file financial disclosure reports with the Committee on Judicial Ethics of the U.S. Judicial Conference, as well as with the District of Columbia Judicial Disabilities and Tenure Commission. According to Judge Edward A. Tamm, Chairman of the Judicial Conference Committee, the

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*/ This item was not part of the Horsky Committee Study.

judges and employees of the District of Columbia Courts should not come under the jurisdiction of the Judicial Ethics Committee because that Committee was established to review financial disclosure reports of federal judges exclusively. The judges of the District of Columbia and their employees are already covered by the D.C. Judicial Disabilities and Tenure Commission and therefore should not be required to file financial disclosures with a judicial ethics committee set up for the federal judiciary.

ITEM NO. 12

Proposal for Certification of Local Law Questions*/

Amendment

Add the following new Chapter to Title 11 of the District of Columbia Code:

Chapter __. Certification of Questions of Law.

§1 Power to Answer

The District of Columbia Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or the highest appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before the certifying court questions of law of the District of Columbia which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals.

§2 Method of Invoking

This Act may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause.

§3 Contents of Certification Order

A certification order shall set forth (1) the question of law to be answered; and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

§4 Preparation of Certification Order

The certification order shall be prepared by the certifying court and forwarded to the District of

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*/ This proposal was not part of the Horsky Committee Study.

Columbia Court of Appeals by the clerk of that court. The District of Columbia Court of Appeals may require the original or copies of all or such portion of the record before the certifying court as it deems necessary to a determination of the questions certified to it.

§5 Cost of Certification

Fees and costs shall be the same as in appeals docketed before the District of Columbia Court of Appeals and shall be equally divided between the parties unless otherwise precluded by statute or by order of the certifying court.

§6 Briefs and Argument

The District of Columbia Court of Appeals may prescribe rules of procedure concerning the answering and certification of questions of law under this chapter.

§7 Opinion

The written opinion of the District of Columbia Court of Appeals stating the law governing the questions certified shall be sent by the Clerk to the certifying court and to the parties.

§8 Power to Certify

The District of Columbia Court of Appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any state under the conditions set forth in section 1.

§9 Procedure for Certifying

The procedures for certification from the District of Columbia to the receiving state shall be those provided in the laws of the receiving state.

Purpose

The proposed legislation is patterned after the Uniform Certification of Questions of Law Act, 12 U.L.A. 52 (1975),

which has been adopted by statute or rule in twenty-four states.

The proposal was suggested by the Legislative Committee of Division IV of the D.C. Bar as a result of inquiries received from the United States Court of Appeals for the District of Columbia Circuit. It would permit that Court and any other United States Court of Appeals, the Supreme Court of the United States, and the highest court of any state to certify questions of District of Columbia law to the District of Columbia Court of Appeals which would have discretion to act on the certification.

Information was obtained from the National Center for State Courts about experience under the Uniform Act. Also, the Corporation Counsel's office supplied information as to the possible case load that might result from adoption of the proposal. That information was considered by the District of Columbia Court of Appeals and the informal legislative group has been advised that that Court has no objection to the proposed legislation so long as it provides -- as the proposed language does -- that

1) The District of Columbia Court of Appeals has discretion to decide whether to act on the certification, and

2) Certification is limited to the Supreme Court of the United States, the United States Courts of Appeals, and the highest courts of the states.

Adoption of the proposal would provide a means for obtaining -- without unduly burdening the District of Columbia Court of Appeals -- authoritative resolution of undecided questions of District of Columbia law that may be determinative of proceedings pending in the certifying court.

Senator MATHIAS. Our next witnesses will form a panel representing the D.C. Bar Division VI, Gay Gellhorn and James McKay, along with the D.C. Commission on Judicial Disabilities and Tenure, chaired by Dr. Bette L. Catoe, and Professor Broderick of the Antioch School of Law.

Once again, I would urge you to submit your statements for the record and to summarize as briefly as possible because the bells on the Senate floor have been very cooperative so far, but there is always a possibility that we will get interrupted by a vote, and I don't want to have to shorten this hearing.

TESTIMONY OF JAMES C. McKAY, JR., CHAIRMAN, LEGISLATIVE COMMITTEE OF DIVISION VI, DISTRICT OF COLUMBIA AFFAIRS, THE DISTRICT OF COLUMBIA BAR; GAY GELLHORN, DISTRICT OF COLUMBIA BAR, DIVISION VI, DISTRICT OF COLUMBIA AFFAIRS; BETTE L. CATOE, M.D., D.C. COMMISION ON JUDICIAL DISABILITIES AND TENURE; AND KATHERINE S. BRODERICK, PROFESSOR OF LAW, ANTIOCH SCHOOL OF LAW

Mr. McKAY. My name is James McKay. I am the chairman of the Legislative Committee of Division VI, District of Columbia Affairs, of the District of Columbia Bar.

I am also a member of the steering committee.

Gay Gellhorn, next to me, is a member of the steering committee and the legislation commission.

We have submitted a statement for the record. I don't feel any compulsion to read it to you.

Senator MATHIAS. Without objection, we will place in the record the two written statements that you have brought with you.

Mr. McKAY. We have taken a number of positions on various sections of the bills. We generally favor pro home rule amendments to the bill. We do have concerns similar to those expressed by the Council for Court Excellence concerning the hearing commissioners, and I will, at this point, let Gay Gellhorn, next to me, explain our concerns in this regard.

Ms. GELLHORN. Good morning, Senator Mathias. I am Gay Gellhorn.

Our points on the hearing commissioner section of H.R. 3578 are pretty straightforward. Unlike the other issues addressed by this act, the appointment standards and procedures, discipline, powers—indeed, even the need for hearing commissioners—hasn't had the benefit of the kind of focused study that Mr. Pickering's committee gave to other matters before the Congress in this bill.

I think the answer to the question of whether we need a study is simply that we have not started to talk to each other. The tension in this kind of enactment is the tension between the very real administrative needs of a court system—the delivery of justice—and the quality of justice. Until there is some dialog between the hearing commissioners, the court administrators, the academics, the bench, and the bar, I am not sure that we will come to the most precise definition of what is best for the courts of the District of Columbia.

Our position before the House was that the legislation creating permanent authority for hearing commissioners would have the

negative effect of discouraging evaluation of the program. Severing section 3 from this act in order to permit that kind of focused study would be an option we would support. Division VI, of course, stands ready to do some of the work, if that is the decision of this committee.

In addition, our prepared statement reflects the study that we have been able to do to date. If section 3 remains in the act, we certainly join the Council for Court Excellence in urging the amendments it proposes.

We won't reiterate them here.

We make two additional suggestions: first, a 5-year bar membership because experience and judgment are so crucial; and, second, language restricting the concurrent practice of law by commissioners.

I would be available to answer any questions you may have after you have heard from the panel.

Senator MATHIAS. Thank you very much.

Dr. Catoe.

Dr. CATOE. I thank you for this opportunity to appear. I am Bette L. Catoe, chairperson of the D.C. Commission on Judicial Disabilities and Tenure. I will not read our entire submission, but I do think there are certain items that need to be emphasized.

Senator MATHIAS. Without objection, we will insert your written statement into the record.

Dr. CATOE. One of those items is the elimination of the duplicate judicial financial reporting requirement. Currently, the judges are required to give a financial disclosure report to the Federal Judicial Ethics Committee and the clerk of the judge's respective court, and to file a financial report with the commission.

This provision will require judges to file a financial statement only with the commission, and this will be reviewed by the commission. We feel that the filing of one statement will be sufficient.

A second item is this. Section 13 would require the commission, upon request, to disclose to the nomination commission information concerning any judge who is a candidate for a chief judgeship or a candidate for elevation to the appellate court.

This gave us cause for concern in that we function under a strong confidentiality provision and rules that had been upheld, but this bill does, we assume, give the same confidentiality and freedom from dissemination of information under the Freedom of Information Act, which will probably not make the people who talk to us feel that the information given will be disseminated.

We feel that, even under this provision, that some information will not be sent to the commission or persons who give us information will feel that if we disseminate it to another committee their names will be divulged and they may be hesitant to submit any further information to the commission.

I will entertain questions on that if you want me to go deeper into the subject.

The commission has felt that the statute should permit more time for the commission to conduct a thorough evaluation of a judge who is considering reappointment. This provision—and we thank you for it—will statutorily provide the commission with adequate time to conduct reappointment evaluations. As you know,

judges will now be required to notify the commission of their intentions to seek reappointment 6 months prior to the expiration of their terms.

As for modification of judicial reappointment evaluation categories, as stated under section 15, which would delete the exceptionally well-qualified evaluation category, the commission concurs with this provision, mainly because we feel that it is not necessary because our evaluation reports, as sent to the President, point up the exceptional contributions of judges to the courts; and we feel that this would eliminate the feeling of a popularity contest and eliminate the feeling that if I did not get an exceptionally well-qualified category, why not?

There is also the problem of whether an extremely learned judge who, perhaps, may not move his cases along as fast as another judge is anymore exceptionally well qualified than a less-learned judge who moves the cases in a workhorse superior court.

As for services of retired judges, section 16 deals with that. This provision will eliminate the current statutory requirement that, within 180 days of the date of retirement, a judge must request a recommendation from the commission to be appointed a senior judge. This provision will allow a judge to retire and then request a recommendation at any time in the future. If a judge were to retire and leave the court for an extended period of time and then request a recommendation, it may be more difficult for the commission to make a determination about his or her fitness to serve. Because there will be no recent data or information concerning judicial service with which to evaluate his or her request, the commission strongly believes that a retired judge should be required to request a recommendation no later than one year after the date of retirement.

To reinforce this recommendation, I should give some worst-case examples which will be just that; but they can happen.

For instance, if a judge decides to notify us 10 days before his retirement that he is going to request designation as a retired judge and if he is sitting on a case that is ongoing or the chief judge feels that his services are needed now, then there is no way, with the procedures as set up, that we can certify this judge within 10 days so that he can continue serving.

If a judge has been absent from the court for 2 to 5 years, it is very difficult; that is, it will be very difficult to ascertain the consequences of advanced age since he has left the court. A worst-case example of that would be a judge who had, for instance, a little senility before he left but develops what we call "the senility of paranoia" and the grandiose idea of senility and decides that he can go back on the court. So, he applies. We will have no idea what has happened to him in the interim.

Also, there is the question of what are the interim activities of these judges? There are certain associations that judges cannot have while they are currently sitting on the court. Was this adhered to during the interim time, or were there associations that would not be in the best interest of the court?

Also, the contact interviews would be stale. If a judge waits, say, 10 years—this is a worst case—maybe persons who had appeared before that judge in court previously will not be available, or their

memories will have dimmed sufficiently that they cannot accurately remember a judge's capabilities.

Also, it will be difficult to retrieve case studies. Each judge has to submit to the commission a summary of cases that he or she feels represents the scope of their service on the court. The Commission had one experience with a judge who had placed everything in storage, and it was very difficult for the judge to retrieve the necessary materials.

These worst-case examples are given to emphasize the point.

I appreciate the opportunity to appear before you, and I will answer any questions that you may have.

Senator MATHIAS. Thank you very much, Doctor.

Professor Broderick.

Ms. BRODERICK. Thank you, Senator. I am Katherine Broderick. I am a faculty member at the Antioch School of Law, and I run the criminal defense clinic, which means that I train third-year law students in court. As such, I have spent a lot of time before hearing commissioners, which will be the subject of my remarks.

Last summer I began writing a law review article on the creation, of what I certainly consider to be a second and lower tier of judicial officer in the District of Columbia. I want to thank Eileen Mayer for helping me with that research.

I also, in passing, want to say that I fully support the 1-day/one-trial idea, but it is too late for me. I have been called for jury duty for 2 weeks, beginning in April.

At the time of the initial passage of the hearing commissioner statute, Senator, you suggested that it should be studied after 1 year, as a pilot project, prior to making it permanent. I would, for several reasons, heartily endorse that study.

The hearing commissioner statute provides for selection and removal of the commissioners entirely at the discretion of the chief judge. Even where a five-member board of judges, selected by the chief judge, makes the choice, there is still no forum in which the affected community can express its views concerning the selection, the discipline, or the removal of the commissioners. At best, under the current system members of the bar or community can try to write a letter to Chief Judge Moultrie or make an appointment with the busy chief judge.

I should say that, since word of my article has gotten around the courthouse, I have received numerous communications, primarily from members of the bar, with complaints about the system, or about individual hearing commissioners. These people seem to feel that it won't be to any avail to complain to the very person who appointed the hearing commissioners.

In addition, there is no confidentiality provision in the statute, should complaints be made, which is a real problem.

Also, there is no independent forum in which a threatened commissioner can defend him or herself against unfounded charges. A number of the hearing commissioners with whom I have spoken have expressed concern about that.

As has been pointed out by others, the statute has no job security provision. There is no tenure. That is also of great concern to the sitting hearing commissioners.

We all know that one of the lessons of the Court Reform Act was that long tenure—15 years for judges here—is the best way to entice able lawyers to the job. I am concerned about the applicant pool that you will have for hearing commissioners if there is no tenure at all, as is currently the case.

The hearing commissioner job itself carries low status, comparatively low salary. There is virtually no training, and there is minimal support staff. Right now, they have 1 law clerk for 10 hearing commissioners. Although there are slots for two law clerks, one has recently left the job, and they have one to share. There are 4 secretaries for 10 hearing commissioners. It is almost impossible to get a message to them.

The commissioners are also very often relegated to the basement cave-like hearing rooms at the courthouse, where they are surrounded by U.S. marshals and handcuffed defendants overflowing out into the hall, since there are no adjoining cellblocks.

It is a very, very difficult job.

Several of the positions involve an enormously high caseload. The commissioner who sits in arraignment court, for example, has to hear between 80 and 110 cases in a day. The cases generally involve routine facts and legal theories over and over, all day long. The level of tedium is enormous.

On the other hand, the decisions involve liberty, the family unit, and property—extremely important and emotionally taxing decisions with families sobbing in court during preventative detention hearings and so on.

The burnout potential is extreme.

I suggest that if you ask any of the sitting judges, they will tell you that they are thrilled to death to be rid of the responsibilities now handled by hearing commissioners.

I submit that the privisions of the proposed legislation regarding selection, removal, and salary, the lack of job security, and status, and the responsibilities of the job itself, will have a devastating impact on the court's ability to attract men and women, with the level of experience, independence, and judgment necessary for the job.

And, I am not saying here that the present hearing commissioners are incompetent. I am suggesting that the fact that we have some good people is more due to luck than to design.

The explicit—and this is very important—intent of Congress in this statute was that the hearing commissioners were to handle the more "ministerial duties" to free up the judges to handle felony trials. I suggest that they are handling far more than just ministerial duties. They preside over misdemeanor trials; they pass out sentences, including periods of incarceration; they make virtually every bond and preventative detention decision in felony and misdemeanor cases, including murder I cases, armed robbery, rape, kidnapping, and so on. They conduct felony preliminary hearings. They revoke periods of probation initially set by judges of the court. They handle divorce, juvenile, and small claims cases. In short, they make crucial liberty decisions, as well as property and family ones.

I don't think that those are "ministerial duties" which is what the stated legislative intent regarding the powers of the hearing commissioners was.

The only comprehensive study, as you well know, of the court system is the Horsky committee report in which they recommend a somewhat enhanced role for what were essentially three existing clerk positions: the judgment and review clerk of landlord-tenant; the domestic relations commissioner; and the civil motions commissioner.

These positions were to be empowered to act on routine unopposed motions of an uncomplicated nature, as long as appropriate safeguards were in place and as long as judicial review at the superior court trial court level was provided.

The Horsky report did not suggest the creation of a second and lower tier of judicial officer. Also important is the fact that they never considered, or recommended the use of hearing commissioners in the criminal division where 5 now preside, of a total of 10.

I find the use of hearing commissioners in criminal cases is particularly disturbing, as do several members of both the bench and bar with whom I have spoken.

Furthermore, as drafted, the statute empoweres hearing commissioners to hear virtually any case in the courthouse because it says they can hear anything not inconsistent with the Constitution or the laws or the court rules.

Possibly, most important, are the people over whom the commissioners must preside. The vast majority of cases find our poorest citizens—indigent defendants, children with special needs, and the like—pitted against institutional litigants, like the U.S. Attorney's Office, the Corporation Counsel, and the Department of Human Services.

By and large these citizens are not represented by major, high powered, downtown law firms but by the Fifth Street Bar. The level of representation is often unequal. The judicial officer is subject to terrible pressures from the institutional litigants. The jails are full. The shelters for children are overflowing. The substance-abuse programs are, in some cases, poorly run. They are closing down and opening new ones all the time.

Extremely important decisions must be made all day, every day.

It is my feeling that these decisions should be made by an independent judicial officer, one who does not owe his or her job to any one person, one selected on the basis of community involvement, and so on.

I don't think that it is fair that wealthier citizens have automatic access to full judges on the civil I and II calendars for there cases involving large sums of money, while our poorer citizens are relegated to assembly line justice, handled by generally less-experienced and lower paid hearing commissioners with uncertain jobs.

I don't believe that the problem can be remedied, as has been suggested, by copying the provisions of the Magistrates' Act. The jobs involved are very different. For example, the magistrates might handle 4 or 5 arraignments in a day, whereas our commissioners handle between 80 and 110. The number of magistrates cases is a fraction of the number handled by hearing commisioners.

The litigants are very, very different. In Federal District Court they are generally represented by high powered, downtown law firms. In addition, there are several unresolved constitutional issues regarding the Magistrates' Act, with cases coming down every week interpreting it one way or the other.

I also don't believe that the problems can be resolved by the promulgation of additional court rules. The problems with the proposed statute are comprehensive and fundamental. I would concur with those speakers who note the lack of finality in findings and sentences made by commissioners. The court rules cannot provide for broad community-based input. They haven't, as Mr. Harahan suggested, provided for D.C. residency. The court rules have not reconciled the statutory requirements of the mental retardation statute with the current use of hearing commissioners in superior court.

The D.C. Court of Appeals in *Kwakye* v. *United States,* last July indicated that the review process for the decisions made by hearing commissioners is unclear and should be spelled out by court rule. Since July, they have not come up with a court rule to do that. In that case, it became very clear to the court of appeals that the review process was a rubber stamp. They said that in the decision. The court of appeals said, "We don't know what the right process is; figure it out; write a rule." They haven't done it since July, and there are hundreds of cases in abeyance in terms of the right way to resolve the review process. My point is, whether or not the litigants are entitled to a full hearing de novo, in some circumstances, whether or not they are simply permitted to provide pleadings, whether they get a hearing, and so on are questions still not answered during the last several months.

Statutory provisions should be made to ensure that the right to elect a judge is both known to the parties and not chilled in anyway when exercised.

The statute should explicitly require that the hearing commissioners not practice law on the side, as suggested by Ms. Gellhorn and that they are bound by the judicial canon of ethics. That is not explicit in the statute.

In closing, I would note that the Horsky committee study, published in 1983, described a great increase in the confidence in the court system felt by citizens in the District of Columbia. I think the proposed legislation has a potential to undo much of the good that has been done by court reform.

For all the reasons that I have stated, and for many others, I urge this committee to follow your wisdom, as stated in 1982, that this should be a pilot project and that the effect of it should be studied. I recommend that an independent commission, composed of members of the bench, bar, and concerned citizens, be empowered to collect and evaluate data regarding the following: First, whether the crucial decisions now being made, but beyond ministerial duties, I should say, by hearing commissioners in trials, felony preliminary hearings, preventative detention, probation revocations, and the like, whether or not they should be made by judicial officers with the independence guaranteed by a community-based merit selection system with tenure, with high salaries, and with

sufficient support staff, and who are subject to the controls of the Judicial Disabilities and Tenure Commission.

They should also study whether the implementation of the nearly 500 recommendations for improved court management made by the Horsky committee and the arrival of the seven new judges in 1984 have affected the need for additional judicial resources.

Third, whether the experience of similar jurisdictions in using a second and lower tier of judicial officer has been fruitful and where such officers are used, what selection, removal, salary, tenure, and staff provisions have been made.

And, finally, whether some aspects of the Magistrates' Act are feasible.

I hope this committee will sever the hearing commissioner statute from the proposed legislation until such studies are completed and further hearings can be held.

Thank you very much for giving me the opportunity to express my views.

Senator MATHIAS. Well, Professor Broderick, you illuminate Cardinal Richelieu's wisdom when he said, "Oh, that my enemies should write a book."

Let me turn, first, to section 2 of H.R. 3578.

What is the feeling of this panel with respect to the reports that the U.S. attorney now submits on prosecution statistics? Is there a need for further reporting?

Mr. MCKAY. Division VI would certainly support that, Senator Mathias. We feel that the information would be important to the District government. A sense of cooperation, too, would be enhanced.

Senator MATHIAS. You think that the additional reports are required?

Mr. MCKAY. I think it would improve the situation.

Senator MATHIAS. Do you take the same view, as the previous panel, that this merely requires the publication of these statistics?

Mr. MCKAY. I think a publication would comply with this section.

Senator MATHIAS. Turning to the hearing commissioners, do you think that legislation is required for the various suggestions that have been made with respect to hearing commissioners, or do you think court rule is adequate to handle it?

Ms. BRODERICK. If you are asking me, Senator, I think that legislation is absolutely required. I think that Congress has the authority, as you know, regarding the judiciary for the District of Columbia. In court reform, you made all of the provisions for judges and the court executive and so on regarding tenure, salaries, selection, removal, and so on. I don't think there is any reason to delegate to the court the ability to make the exact same decisions regarding other judicial officers.

The Magistrates' Act is a statute not created by court rules. The number of rules that would have to be promulgated is enormous regarding a finality of decisions, the process of review in all the various areas in which the hearing commissioners sit there would have to have a rule for each one. There is the consent of the parties, the right to elect a judge and the not chilling of that right. There are many other rules which would be needed as well.

Senator MATHIAS. What about Judge Moultrie's comment that legislation that is highly specific creates a second tier of justice?

Ms. BRODERICK. I think—I almost called you Your Honor being so used to court—it is a fiction to say that it is not a second tier, a fiction employed by no other jurisdiction that I know of. The bottom line is judicial independence. You want people making these liberty decisions and these property and family unit decisions who have independence. When you sit entirely at the discretion of one person——

Senator MATHIAS [continuing]. That is a philosophical disagreement with Judge Moultrie's testimony. He views them as an arm of the court.

Ms. BRODERICK. Well, but should they be? Should the people making those decisions be an extension of someone else? I don't think that they should. I don't think that they are. And, they certainly aren't viewed that way in any other jurisdiction that I know of.

Senator MATHIAS. What is this panel's view of the way to handle sitting commissioners, existing commissioners?

Ms. GELLHORN. I think that it would be useful to have sitting commissioners fall within the proposals of any new legislation, but it is always a difficult question. I don't have a specific proposal.

I think Chief Judge Moultrie's proposal to handle the commissioner question by local rules simply goes counter to the court reform movement. Remember, the magistrates replaced commissioners in the Federal system. Commissioners had been appointed by precisely the method in the proposed bill, that is, by one judge, and their duties were assigned by local rule. It was not found to be a satisfactory system for the administration of justice or for the appearance of equal justice.

Senator MATHIAS. If the committee concludes that a further study is necessary, would you find it appropriate that that study be requested from the District of Columbia Bar?

Ms. GELLHORN. I would hope that any study would be requested of both the bar and the bench. I think it would be very important to include the administrative arm of the courts——

Senator MATHIAS. Well, I would contemplate that a bar study would certainly consult all the appropriate players on the scene.

Ms. GELLHORN. We certainly have a model for how to go about it, how to do it right.

Dr. CATOE. As a layperson—and, as chairperson of the commission—it has been indicated a couple of times that we should have oversight over the hearing commissioners. I think that the duties and responsibilities of the commissioners should be clearly defined. Any areas of disagreement and the method for solving these should be clearly defined, and we should definitely be very careful that commissioners are not used in the place of judges and that the lay public, particularly those not able to afford the sophisticated legal help, will not be relegated to the commissioners in place of judges in cases where judges should preside.

As far as the commission as oversight, over the hearing commissioners, No. 1, I don't think we are looking for any extra work in that we are all volunteers, and as such, have fulltime employment otherwise. We have, I believe, received one complaint concerning a

hearing commissioner, at this time, that was forwarded to the courts. I guess, at this stage with no legislation, complaints concerning the hearing commissioners go through the chief judge who in turn will send it to the panel of of five judges or the board, as it is called, and they would have to promulgate a set of rules to deal with it.

But I think we are in danger. I understand the two-tier argument, but I think, just because of the overload of the superior court and the court of appeals, that you are in danger of not just getting two tiers; you are in danger of getting a whole substitute legal judicial system that we, at some later date 10 years down the road, will have to back away from.

So, as a layperson, I would have concerns from the beginning about monitoring the system and laying down certain specific limitations.

Senator MATHIAS. Well, if the committee were to request the District of Columbia Bar to make such a study, how much time do you think should be alloted for that study?

Ms. BRODERICK. Well, knowing the District of Columbia in the summer, I would say, probably, until next fall would be realistic, sometime next fall.

I would urge you to hold further hearings next fall, but I think that legislation could be proposed by the end of the year.

Senator MATHIAS. You are thinking a 6-month study, then?

Ms. BRODERICK. Six or eight months, yes.

Senator MATHIAS. Dr. Catoe, I understand your point about a time limit following retirement when a judge can request certification for senior-judge status. What effect do you think this would have on the number of judges who come back from retirement to provide the court with expertise?

Dr. CATOE. Do you mean the keeping of the anytime proposal or keeping the——

Senator MATHIAS [continuing]. Putting a time limit on it.

Dr. CATOE. As for putting a time limit on it, I don't think that that will affect the numbers of judges. I think with this first round several of the judges were opposed to the whole procedure and most certainly opposed to the fact that they had to make a decision in a certain amount of time. But we found that most of those who were, first, opposed to it realized the necessity of having some kind of order and some kind of timeframe for a logical process.

So, I don't think it will be significant.

Senator MATHIAS. When you review a retired judge's capacity to serve as a senior judge, do you limit that review to active duty on the bench?

Dr. CATOE. I am not certain I understand your question.

Senator MATHIAS. Do you look only at the judge's judicial duties, or do you look at other factors?

Dr. CATOE. Well, we look at his judicial duties. If any nonjudicial conduct has come to our attention, which reflects unfavorably on the judiciary, then we look at that also.

Senator MATHIAS. Should the review be broader? Should you look at a broader vision of a judge's activities?

Dr. CATOE. No; I don't think we should—we have worked out a process and, of course, this was the initial use of the process. I

think that it should not be broader. In fact, I am beginning to feel that it should not be as broad as it is in that the review of 16 retired judges this past fall was awesome, but I think it should include the judge's judicial duties and any nonjudicial activities that impact upon his fitness to serve.

I am not certain I have answered your question.

Senator MATHIAS. No, I think that gets at what I am trying to understand.

I appreciate your testimony and that of the other members of the panel. It is very helpful to have your views and you, obviously, have given it a great deal of thought and consideration.

I might say to you and to other witnesses who appeared before us that there may be some further questions which will arise as we review the testimony, and we would request that you submit answers in writing to written questions.

They would be made a part of the record.

Along with Professor Broderick's written testimony which I will insert into the record, I have some further statements for the record: From the Public Defenders Service for the District of Columbia; from Common Cause for the District of Columbia; from the District of Columbia Judicial Nominating Commission; from the Greater Washington Board of Trade; and from the National Conference of Commissioners on Uniform State Laws, the last one having been previously inserted as part of the testimony of Mr. McKay.

[The prepared statements of James C. McKay, Jr.; the National Conference of Commissioners on Uniform Laws; Bette L. Catoe, M.D.; and Katherine Broderick follow:]

STATEMENT OF
JAMES C. MCKAY, JR.
CHAIRMAN, LEGISLATION COMMITTEE
DIVISION VI (DISTRICT OF COLUMBIA AFFAIRS) OF THE
DISTRICT OF COLUMBIA BAR*
BEFORE THE
SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA
GOVERNMENTAL AFFAIRS COMMITTEE
UNITED STATES SENATE
ON
H.R. 3578
DISTRICT OF COLUMBIA JUDICIAL EFFICIENCY
AND IMPROVEMENT ACT OF 1985

March 5, 1986

Mr. Chairman and members of the Committee:

Thank you for the opportunity to submit a statement on H.R. 3578, the District of Columbia Judicial Efficiency and Improvement Act of 1985. This statement is made on behalf of Division VI of the District of Columbia Bar, the Division responsible for monitoring legislative and judicial developments that affect the District of Columbia.*

PRO-HOME RULE AMENDMENTS

We support a number of provisions in the bill which are a logical outgrowth of the Court Reorganization and Self-Government Acts and which further home rule by enhancing the independence of the District of Columbia Government from the Federal Government.

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* STANDARD DISCLAIMER

The views expressed herein represent only those of Division VI (District of Columbia Affairs) of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

We support section 2 of the bill, which requires the United States Attorney for the District of Columbia to submit annual reports on prosecutions and convictions by the United States Attorney for the District of Columbia to the Mayor and Council. We believe that it would be of great benefit to the District Government in fulfilling its administrative and legislative responsibilities over the District's criminal justice system.

In addition, we support provisions of the bill eliminating the federal role in the administration of the District's criminal justice system. We therefore favor section 4, which deletes the requirement that the Executive Officer of the Court be selected from a list provided by the Administrative Office of the United States Courts, and section 6, which eliminates the Chief Judges of the Federal Circuit and District courts from the panel that appoints the Board of Trustees for the Office of the Public Defender for the District of Columbia.

Similarly, we support section 8, which eliminates the requirement that District of Columbia Judges file financial disclosure reports with the Federal Judicial Ethics Committee, in view of the existing requirement in D.C. Code § 11-1530 that these judges file similar reports with the District of Columbia Commission on Judicial Disabilities and Tenure. We believe that it is consistent with court reform and home rule that the District of Columbia judiciary report

to an agency of the District of Columbia Government rather than the Federal Government.

Likewise, we support section 9, which would enact the Uniform Certification of Questions of Law Act in the District of Columbia. It authorizes the D.C. Court of Appeals to answer questions certified to it by federal and state appellate courts. Twenty-four states have enacted this uniform law since it was adopted by the National Conference of Commissioners on Uniform State Laws in 1967. We support its enactment in the District because it is consistent with the theory embodied in the Court Reform Act that the District of Columbia Court of Appeals should be treated like the highest court of a state and because it would be in the interests of judicial economy.

HEARING COMMISSIONERS

We have reservations, however, about section 3, which would make permanent the temporary statutory authorization for hearing commissioners. We join the statement of the Council on Court Excellence, submitted before the House District of Columbia Committee on this bill, in urging amendment of the proposed legislation by incorporating certain standards taken from the Federal Magistrate's Act, 28 U.S.C. § 631 et seq. These amendments relate to the appointment, qualifications, functions, tenure, and removal of hearing commissioners. We offer these specific comments:

1. Appointment of hearing commissioners by concurrence of all active judges pursuant to standards and procedures, including a merit selection panel, should be included in the bill, as the Council on Court Excellence recommends.

2. Since experience and judgment are significant qualifications, the Committee may wish to consider a five year bar membership requirement, as provided for federal magistrates, instead of three years.

3. The bill in its current version contains no express provision that full-time hearing commissioners may not engage in the practice of law or that part-time commissioners may not serve in criminal actions "nor act in any capacity that is . . . inconsistent with the proper discharge of their office." See 28 U.S.C. § 632(a), (b). Restrictions on the concurrent practice of law are, perhaps, implicit in the proposed amendment to D.C. Code § 11-1732(g) that Commissioners "shall abide by the Canons of Judicial Ethics," but should be made even more explicit.

4. We agree with the proposal of the Council on Court Excellence of a minimum term for hearing commissioners. See proposed amendment to D.C. Code § 11-1732(e), (f), (g). The Council on Court Excellence has proposed a 8-year term, identical to that provided for Federal Magistrates. As judges of the District of Columbia Courts, unlike Federal judges, are not appointed for life, but for 15 years, it would, perhaps, be more appropriate to reduce the term to 5

years. Cf. D.C. Code § 40-504(a) (5-year term for hearing examiners of the Bureau of Traffic Adjudication).

5. Finally, we agree with the comments of the Council on Court Excellence that hearing commissioners should be removable only for cause. We suggest that the Committee adopt the most current procedures and standards relating to the removal of judges of the District of Columbia Courts enacted in 1973 by sections 431(d) and 432 of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code, title 11 (appendix).

JUDICIAL NOMINATION COMMISSION

We have a varied reaction to the provisions concerning the Judicial Nomination Commission. We fully support section 14, which would give the Commission additional time to evaluate judges who have made themselves available for another term. We also support section 12, which would make the list of judicial nominees public.

While we have no opposition to section 11, which would make materials furnished to or developed by the Judicial Nomination Commission privileged and confidential, we do not believe that it is necessary or desirable to include the final sentence of the section, which provides that the Federal Freedom of Information Act would not apply to those materials. This sentence is unnecessary because the Nomination Commission, as an agency of the District Government, is specifically excluded from the scope of the

Federal Freedom of Information Act by 5 U.S.C. § 551(1)(D). Therefore, to include this sentence would, at best, cause confusion, and, at worst, lead to the implication that the Federal Freedom of Information Act might apply to other agencies of the District Government.

We oppose section 11 because we believe that the Council should be permitted to exempt the Commission from the Open Meetings provision, D.C. Code § 1-1504. This provision, although originally enacted by Congress by Title VII of the Self-Government Act, is a purely local law which the drafters of that Act contemplated would be within the legislative authority of the Council. No one has questioned the Council's authority to amend other provisions of local law enacted by Title VII, such as the amendments to the D.C. Election Act, added by § 751 of the Self-Government Act. Therefore, the Council should be permitted to amend the local Open Meetings provision to provide an exemption for the Commission.

We have reservations about two provisions in section 13 of the bill, which would permit disclosure of certain confidential information submitted to the Commission--namely, the provision authorizing a judge to disclose confidential medical information, which may have the practical effect of forcing its disclosure, and the provision requiring disclosure of documents at a hearing before the Commission for the purposes of prosecution for

perjury before the Commission, which may raise fifth amendment concerns. We believe that these provisions should be more fully discussed before enactment.

TENURE COMMISSION

We oppose section 15 of the bill, which would eliminate the option of the Tenure Commission to rate a judge "exceptionally well-qualified." The requirement can and should be made to serve the purpose of recognizing those judges whose service is truly exceptional. It also serves as an inducement to judges to maintain a high quality of justice. In our view, any efforts expended concerning this requirement should be devoted to making the rating meaningful by, for example, encouraging the Commission to give reasons for an "exceptionally well-qualified" rating. Therefore, we believe that this section should be deleted from the bill.

CONCLUSION

In conclusion, we support the many provisions of H.R. 3578 that further the independence of the District's judicial and criminal justice system and thereby enhance home rule. We have reservations about certain provisions that are unrelated to this purpose, and hope that the Committee will reconsider the ones that we have mentioned. With these exceptions, we support this legislation and hope that the Committee will take favorable action.

Thank you for the opportunity to submit this statement.

STATEMENT OF
JAMES C. MCKAY, JR.
LEGISLATIVE LIAISON FOR THE DISTRICT OF COLUMBIA
FOR THE
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
BEFORE THE
SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA
GOVERNMENTAL AFFAIRS COMMITTEE
UNITED STATES SENATE
ON
H.R. 3578
DISTRICT OF COLUMBIA JUDICIAL EFFICIENCY
AND IMPROVEMENT ACT OF 1985

March 5, 1986

Mr. Chairman and members of the Committee:

Thank you for the opportunity to submit this statement on H.R. 3578, the District of Columbia Judicial Efficiency and Improvement Act of 1985. I am making this statement in my capacity as a Commissioner from the District of Columbia to the National Conference of Commissioners on Uniform State Laws and as the Legislative Liaison for the District of Columbia for the Conference. My comments are limited to Section 9 of the Bill, which would enact the Uniform Certification of Questions of Law in the District of Columbia.

Since it was approved by the National Conference of Commissioners on Uniform State Laws in 1967, the Uniform Certification of Questions of Law Act has been adopted by 24 states* by statute or court rule. The Act provides an

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*Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachuessetts, Minnesota, Mississippi, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, Washington, West Virginia, Wisconsin, and Wyoming.

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answer to the need for cooperation between federal and state courts precipitated by the 1938 decision of the Supreme Court in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), which required the federal courts to apply, and therefore ascertain, state common law. One approach was the development of the abstension doctrine starting with the decision in Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941), which provides that in federal suits challenging state actions where resolution of an issue of state law may obviate the need for a decision on federal grounds, the federal court should postpone exercise of its jurisdiction until a state court has determined the issues of state law. The major drawback to this approach is that it requires the parties to litigate the claim in both federal and state courts, with considerable additional delay and expense.

The Uniform Certification of Questions of Law Act provides a better solution to the need for federal courts to ascertain state law. It permits a federal court to obtain a quick and authoritative answer to difficult questions of state law while preserving the parties' right to a federal determination of issues of fact and federal law. As the Supreme Court stated in Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974), the certification procedure "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism."

Under section 9 of the bill, the D.C. Court of Appeals is empowered to answer questions of law certified to it by a federal court or the appellate court of another state. Two conditions must be satisfied before the state appellate court answers the questions certified: (1) the question of state law which is certified must be one which "may be determinative" of the cause pending in the certifying court; and (2) the question certified cannot satisfactorily be answered by the federal courts in light of state precedent. A federal court simply prepares a certification order containing the question of law and relevant facts, signed by the presiding judge, and forwards it to the D.C. Court of Appeals. That court then renders its opinion after hearing arguments and taking briefs according to its appellate procedure.

We believe that the enactment of the Uniform Certification of Questions of Law Act in the District of Columbia will benefit both federal and District of Columbia court systems by expediting resolution of issues of District law needed by federal courts and thereby enhancing the efficiency of both court systems. In addition, it will benefit federal litigants in cases involving District law by reducing the time and expense of obtaining an authoritative determination of District law. We, therefore, urge the Committee to adopt this section.

Thank you for the opportunity to submit this statement.

STATEMENT OF BETTE L. CATOE, M.D.
CHAIRPERSON
DISTRICT OF COLUMBIA COMMISSION ON
JUDICIAL DISABILITIES AND TENURE
BEFORE
SUBCOMMITTEE ON GOVERNMENTAL
EFFICIENCY AND THE DISTRICT OF COLUMBIA
U.S. SENATE
MARCH 5, 1986

Mr. Chairman, and members of the Subcommittee, I appreciate the opportuntiy to appear before you to discuss the "District of Columbia Judicial Efficiency and Improvement Act of 1985". Because the Act will modify certain procedures of the Tenure Commission, we would like to submit the following comments for the Subcommittee's consideration.

Sec. 8 Elimination Of Duplicate Judicial Financial Reporting Requirement

Currently the judges must file a financial statement with the Commission, and an additional financial disclosure report with the Judicial Ethics Committee and the Clerk of the judge's respective Court. This provision will require judges to file a financial statement only with the Commission, and the Commission believes that the filing of one statement would be sufficient.

Sec. 13(2)(c) Disclosure Of Certain Information To The Judicial Nomination Commission

This provision would require the Commission upon request, to disclose to the Nomination Commission information concerning any judge who is a candidate for a chief judgeship or a candidate for elevation to an appellate court. The Commission has no objection to furnishing information to the Nomination Commission, if the information remains privileged and confidential, and not subject to the Freedom of Information Act, as is stated in Section 10 of the bill. Without the confidentiality provision the Commission would object to disclosing information to the Nomination Commission. The Commission believes that attorneys and the general public would not be as willing to file complaints or speak freely with the Commission if they were to believe that the information would be disseminated to another organization or to persons outside that organization in the absence of the confidentiality provision.

Sec. 14 Reappointment To Judicial Office

The Commission has long felt that the statute should permit more time for the Commission to conduct a thorough evaluation of a judge who is being considered for reappointment. This provision will statutorily provide the Commission with adequate time to conduct reappointment evaluations.

Sec. 15 Modification Of Judicial Reappointment Evaluation Categories

This provision was previously endorsed by the Commission. The Commission believes that its evaluation reports are comprehensive and provide pertinent information as to a judge's strengths, weaknesses, and qualifications, thereby eliminating the need for the "exceptionally well qualified" evaluation category.

Sec. 16 Services Of Retired Judges

This provision will eliminate the current statutory requirement that within 180 days of the date of retirement, a judge must request a recommendation from the Commission to be appointed a Senior Judge. The provision will allow a judge to retire and then request a recommendation at any time in the future. If a judge were to retire, and leave the court for an extended period of time and then request a recommendation, it may be more difficult for the Commission to make a determination about his or her fitness to serve, because there would be no recent data or information concerning judicial service with which to evaluate his or her request. The Commission strongly believes that a retired judge should be required to request a recommendation, no later than one year after the date of retirement.

In addition to our comments concerning the Act, I would like to give the Subcommittee a brief overview of the Commission's functions. The Commission's jurisdiction embraces four areas: (1) A judge's conduct warranting disciplinary action. (2) Involuntary retirement of a judge for reasons of health. (3) Evaluation of a judge at the end of his term upon his seeking reappointment. (4) Review of a retired judge who wishes to continue performing judicial duties as a senior judge.

Mr. Chairman, and members of the Subcommittee, thank you again for the opportunity to appear before you. I will be happy to respond to any questions you may have.

STATEMENT OF KATHERINE BRODERICK
PROFESSOR, ANTIOCH SCHOOL OF LAW,
BEFORE THE SUBCOMMITTEE ON GOVERNMENTAL
EFFICIENCY AND THE DISTRICT OF COLUMBIA
OF THE UNITED STATES SENATE
MARCH 5, 1986

Mr. Chairman, Members of the Committee, thank you for inviting me to appear before you today. My name is Katherine Broderick. I am a faculty member at the Antioch School of Law where I direct the Criminal Defense Clinic. I supervise third year law students in court, and as such, I spend a great deal of time in Superior Court. I am also a member of the D.C. Bar Sub-Committee on Superior Court Criminal Rules. Last summer I immersed myself in the legislative history and related literature concerning the creation of a second, and lower tier of judicial officers in the District of Columbia Superior Court, hearing commissioners. I am well along in the process of writing a lengthy law review article on the subject.

At the time of the initial passage of the hearing commissioners statute in 1982, Senator Mathias, on the floor of the Senate, suggested that the statute be enacted for a one year period as a "pilot project", the effect of which would be studied while the Subcommittee on Governmental Efficiency and the District of Columbia labored to bring about a comprehensive court reform package. For several reasons, which I will state, I

heartily endorse the Senator's suggestion that the use of hearing commissioners be studied prior to the enactment of any permanent statute.

The Senate Committee on the District of Columbia, then chaired by Senator Tydings of Maryland, labored long and hard, over a period of years, to bring about passage of the Court Reform and Criminal Procedure Act, of 1970. A central theme of the Act was to provide legislation which would enable the new, unified Court to attract excellent, independent, experienced judicial candidates. To that end, the Act created a Judicial Nomination Commission, high salaries, fifteen year tenure and a Commission on Judicial Disabilities and Tenure.

By contrast, the proposed hearing commissioner statute provides for selection and removal entirely at the discretion of one person, the Chief Judge. There is no forum in which the effected community can express its views concerning selection, discipline or removal. At best, under the current system, members of the bar and concerned citizens might write a letter or try to make an appointment with the busy Chief Judge in order to voice their concerns. I should say, that since word of my article has gotten around the courthouse, I have received numerous communications, primarily from members of the bar, with complaints about the system or individual hearing commissioners. The feeling seems to be that complaints to the man who appointed the commissioners would be to no avail. There is also the concern that there is no statutory provision for confidentiality should complaints be made. In addition, there is no independent

forum in which a threatened commissioner might defend him or her self against unfounded charges. Several commissioners have mentioned that worry to me.

Furthermore, the statute provides no job security. There is no tenure provision and that is of great concern to all of the hearing commissioners with whom I have spoken. It is well known that the longer the tenure provision, the more likely that the Court will be able to entice able lawyers to leave a busy and remunerative practice, a government job, or any other stable job. The lack of tenure will also ill serve the Court's ability to retain competent commissioners once on board.

The hearing commissioner job itself carries low status, comparatively low salary, virtually no training and minimal support staff. The ten commissioners, for example share four secretaries and two law clerks. At present they have only one law clerk because the other recently left the job. The commissioners are often relegated to tiny, cave-like, basement hearing rooms. Since these rooms do not have ajoining cell blocks, frequently handcuffed defendants, flanked by United States Marshalls, fill the room and overflow into the halls of the courthouse.

Many of the hearing commissioner positions involve an enormously high volume of cases. The commissioner in arraignment court, for example, must hear between 80 and 110 cases each day. The cases generally involve routine facts and legal theories, over and over again, so that the level of tedium is very high. On the other hand, the decisions which they must make involve

liberty, property or the family unit and are therefore extremely important and emotionally taxing. The burn out potential is extreme.

I suggest to this committee that if you asked any of the sitting judges they would tell you that they are thrilled to death to be rid of the responsibilities now relegated to the hearing commissioners.

I submit, that the provisions of the proposed legislation regarding selection, removal and salary, the lack of job security and status, and the responsibilities of the job itself, will have a devestating impact on the Court's ability to attract men and women with the level of experience, independence and judgment necessary for the job.

I am not saying that the present hearing commissioners are imcompetent. I am suggesting that the fact that we have some good people is more due to luck than to design.

The explicit intent of Congress in this statute was that hearing commissioners were to handle the more "ministerial duties" to free up the judges to handle felony trials. I suggest to this Committee, that the Hearing Commissioners are handling far more than just "ministerial duties". They preside over misdemeanor trials and pass sentences including periods of incarceration. They make virtually every bond and preventative detention decision in felony and misdemeanor cases including murder I, armed robbery, rape, kidnapping and the like. They conduct felony preliminary hearings. They revoke periods of probation originally set by judges of the court. They handle

divorce, juvenile and small claims cases. In short, they make crucial liberty decisions as well as property and family ones.

The only comprehensive study of the court system, since the Court Reform Act, was conducted by the Horsky Committee, between 1978 and 1982. The Horsky report recommended a somewhat enhanced role for what were essentially three existing clerk positions, the civil motions commissioner, the domestic relations commissioner and the judgment and review clerk of the landlord tenant division. These positions were to be empowered to act on routine unopposed motions of an uncomplicated nature as long as appropriate safeguards were in place and as long as judicial review at the Superior Court level was provided. The Horsky Report did not suggest the creation of a second and lower tier of judicial offices. Also important, is the fact that the Horsky Committee neither considered nor recommended the use of hearing commissioners in the criminal division, where five now preside. I find the use of hearing commissioners in criminal cases particularly disturbing, as do several members of the bench and bar with whom I have spoken.

Furthermore, as drafted, the statute empowers hearing commissioners to perform any duties consistent with the constitution and the laws of the United States and of the District of Columbia and are assigned by rule of the Superior Court. This language is broad enough to permit hearing commissioners to hear any case in the courthouse.

Perhaps most important are the people over whom the hearing commissioners must preside. The vast majority of cases find our

poorest citizens, indigent defendants, children with special needs, and the like, pitted against institutional litigants like the United States Attorney's Office, Corporation Council and the Department of Human Services. By and large these citizens are not represented by the major downtown law firms but by the Criminal Justice Act bar, the 5th Streeters, as they are known. The level of representation between the parties is often unequal. The judicial officer is subject to pressures from the institutional litigants. The jails are full. The shelters for children are overflowing. The substance abuse programs are in some cases poorly run, in others, overburdened. Extremely important decisions must be made, all day, every day.

These decisions should be made by independent judicial officers who do not owe their jobs to any one person. Our poor citizens have the right to justice meted out by the highest caliber of judges provided for by Congress in the Court Reform Act, attracted to the job by long tenure and high salaries and subject to discipline and removal by an independent body. It is unfair that our wealthier citizens have automatic access to full judges on the civil I and II calendars for their cases involving large sums of money, while our poorer citizens are relegated to assembly line justice handled by generally less experienced and lower paid hearing commissioners with uncertain tenure.

I don't believe that the problem can be remedied by copying the provisions of the Magistrates Act. The jobs involved are very different. The numbers of cases handled by magistrates are a tiny fraction of those handled by commissioners. The litigants

in District Court are generally represented by high powered law firms. In addition, there are several unresolved constitutional issues regarding the Magistrates Act. I also don't believe that the problems can be resolved by the promulgation of additional court rules. The problems with the proposed statute are comprehensive and fundamental. I would concur with those speakers who note the lack of finality in findings and sentences made by commissioners. Court rules can not provide for broad based community input in selection decisions. Court rules have not reconciled the statutory requirements of the Mental Retardation Statute with the current use of hearing commissioners in Superior Court. The statute should spell out the process for review of hearing commissioner decisions required by D.C. Court of Appeals in Kwakye v. United States. There are unresolved questions about the "consent of the parties" issue in that in some areas, consent to the hearing commissioners is presumed where there is no objection, and in other areas a formal consent form must be executed. Statutory provision should be made to insure that the right to elect a judge is both known by the parties and not chilled in any way, when exercised. The statute should explicitly require that the hearing commissioners not practice law on the side and that they are bound by the Judicial Cannon of Ethics.

In closing, I would note that the Horsky Committee Study, published in 1983, described a great increase in confidence in the court system reported by citizens of the District. The proposed legislation has the potential to undue much of the good

done by the Court Reform Act. For all of the reasons I have stated, and for many others, I urge this Committee to follow the wisdom of Senator Mathias. I recommend that an independent commission, composed of members of the bench, the bar and concerned citizens be empowered to collect and evaluate data regarding the following:

1. Whether the crucial decisions now being made by hearing commissioners in trials, felony preliminary hearings, preventive detention, probation revocations, and the like, should be made by judicial officers with the independence guaranteed by a community based merit selection system, with tenure, with high salaries, and sufficient support staff and who are subject to the controls of the Judicial Disabilities and Tenure Commission.

2. Whether the implementaion of the nearly 500 recommendations for improved court management, made by the Horsky Committee, and the arrival of the seven new judges, have effected the need for additional judicial resourses.

3. Whether the experience of other similar jurisdictions in using a second, and lower tier of judicial officer has been fruitful, and where such officers are used, what selection, removal, salary, tenure and staff provisions have been made.

4. Whether some aspects of the Magistrates Act are feasible for use in Superior Court.

I hope that this Committee will sever the hearing commissioners statute from the proposed legislation until such studies are completed and further hearings may be held.

Thank you very much for giving me the opportunity to express my views. I would be happy to answer any questions.

Senator MATHIAS. Thank you very much for being here with us today.

There being no further business to come before the subcommittee, the subcommittee will stand in recess subject to the call of the Chair.

[Whereupon, at 12:20 p.m., the subcommittee was recessed, subject to the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

II

99TH CONGRESS
1ST SESSION

H. R. 2946

IN THE SENATE OF THE UNITED STATES

OCTOBER 29 (legislative day, OCTOBER 28), 1985
Received; read twice and referred to the Committee on Governmental Affairs

AN ACT

To establish an independent jury system for the Superior Court of the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Jury System Act".

SEC. 2. ESTABLISHMENT OF DISTRICT OF COLUMBIA JURY SYSTEM.

Chapter 19 of title 11 of the District of Columbia Code is amended to read as follows:

"CHAPTER 19. JURIES AND JURORS

Sec.
"11-1901. Declaration of policy.
"11-1902. Definitions.
"11-1903. Prohibition of discrimination.
"11-1904. Jury system plan.
"11-1905. Master juror list.
"11-1906. Qualification of jurors.
"11-1907. Summoning of prospective jurors.
"11-1908. Exclusion from jury service.
"11-1909. Deferral from jury service.
"11-1910. Challenging compliance with selection procedures.
"11-1911. Length of service.
"11-1912. Juror fees.
"11-1913. Protection of employment of jurors.
"11-1914. Preservation of records.
"11-1915. Fraud in the selection process.
"11-1916. Grand jury; additional grand jury.
"11-1917. Coordination and cooperation of courts.
"11-1918. Effect of invalidity.

"CHAPTER 19. JURIES AND JURORS

"§11-1901. Declaration of policy.

"A jury selection system is hereby established for the Superior Court of the District of Columbia. All litigants entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the residents of the District of Columbia. In accordance with the provisions of this chapter, all qualified individuals shall have the opportunity to be considered for service on grand and petit juries in the District of Columbia and shall be obligated to serve as jurors when summoned for that purpose.

"§11-1902. Definitions.

"For purposes of this chapter, the following terms have the following meanings:

"(1) The term 'Board of Judges' means the chief judge and the associate judges of the Superior Court of the District of Columbia.

"(2) The term 'chief judge' means the chief judge of the Superior Court of the District of Columbia.

"(3) The term 'clerk' means the clerk of the Superior Court of the District of Columbia or any deputy clerk.

"(4) The term 'Court' means the Superior Court of the District of Columbia and may include any judge of the Court acting in an official capacity.

"(5) The term 'juror' means (A) any individual summoned to Superior Court for the purpose of serving on a jury; (B) any individual who is on call and available to report to Court to serve on a jury upon request; and (C) any individual whose service on a jury is temporarily deferred.

"(6) The term 'jury' includes a grand or petit jury.

"(7) The term 'jury system plan' means the plan adopted by the Board of Judges of the Court, consistent with the provisions of this chapter, to govern the administration of the jury system.

"(8) The term 'master juror list' means the consolidated list or lists compiled and maintained by the

Board of Judges of the District of Columbia Courts which contains the names of prospective jurors for service in the Superior Court of the District of Columbia.

"(9) The term 'random selection' means the selection of names of prospective jurors in a manner immune from the purposeful or inadvertent introduction of subjective bias, so that no recognizable class of the individuals on the list or lists from which the names are being selected can be purposefully or inadvertently included or excluded.

"(10) The term 'resident of the District of Columbia' means an individual who has resided or has been domiciled in the District of Columbia for not less than six months.

"§11-1903. Prohibition of discrimination.

"A citizen of the District of Columbia may not be excluded or disqualified from jury service as a grand or petit juror in the District of Columbia on account of race, color, religion, sex, national origin, ancestry, economic status, marital status, age, or (except as provided in this chapter) physical handicap.

"§11-1904. Jury System Plan.

"(a) The Board of Judges shall adopt, implement, and as necessary modify, a written jury system plan for the

random selection and service of grand and petit jurors in the Superior Court consistent with the provisions of this chapter. The adopted plan and any modifications shall be subject to a 30-day period of review by Congress in the manner provided for an act of the Council under section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act. The plan shall include—

"(1) detailed procedures to be followed by the clerk of the Court in the random selection of names from the master juror list;

"(2) provisions for a master jury wheel (or other device of like purpose and function) which shall be emptied and refilled at specified intervals, not to exceed 24 months;

"(3) provisions for the disclosure to the parties and the public of the names of individuals selected for jury service, except in cases in which the chief judge determines that confidentiality is required in the interest of justice; and

"(4) procedures to be followed by the clerk of the Court in assigning individuals to grand and petit juries.

"(b) The jury system plan shall be administered by the clerk of the Court under the supervision of the Board of Judges.

"§11-1905. Master juror list.

"(a) The jury system plan shall provide for the compilation and maintenance by the Board of Judges of a master juror list from which names of prospective jurors shall be drawn. Such master juror list shall consist of the list of District of Columbia voters, individuals who submit their names to the Court for inclusion on the master juror list, and names from such other appropriate sources and lists as may be provided in the jury system plan.

"(b) Notwithstanding any other provision of law, upon request of the Board of Judges any person having custody, possession, or control of any list required under subsection (a) shall provide such list to the Court, at cost, at all reasonable times. Each list shall contain the names and addresses of individuals on the list. Any list obtained by the Court under the provisions of this chapter may be used by the Court only for the selection of jurors pursuant to this chapter.

"(c) Not less than once each year, the Board of Judges shall give public notice to the citizens of the District of Columbia that individuals may be included on the master juror list by submission of their names and addresses to the clerk of the Court. Such public notice shall be given through such means as will reasonably assure as broad a dissemination as possible.

"§11-1906. Qualification of Jurors.

"(a) The jury system plan shall provide for procedures for the random selection and qualification of grand and petit jurors from the master juror list. Such plan may provide for separate or joint qualification and summoning processes.

"(b)(1) An individual shall be qualified to serve as a juror if that individual—

"(A) is a resident of the District of Columbia;

"(B) is a citizen of the United States;

"(C) has attained the age of 18 years; and

"(D) is able to read, speak, and understand the English language.

"(2) An individual shall not be qualified to serve as a juror—

"(A) if determined to be incapable by reason of physical or mental infirmity of rendering satisfactory jury service; or

"(B) if that individual has been convicted of a felony or has a pending felony or misdemeanor charge, except that an individual disqualified for jury service by reason of a felony conviction may qualify for jury service not less than one year after the completion of the term of incarceration, probation, or parole following appropriate certification under procedures set out in the jury system plan.

"(3) Any determination regarding qualification for jury service shall be made on the basis of information provided in the juror qualification form and any other competent evidence.

"(c)(1) The jury system plan shall provide that a juror qualification form be mailed to each prospective juror. The form and content of such juror qualification form shall be determined under the plan. Notarization of the juror qualification form shall not be required.

"(2) An individual who fails to return a completed juror qualification form as instructed may be ordered by the Court to appear before the clerk to fill out such form, to appear before the Court and show cause why he or she should not be held in contempt for failure to submit the qualification form, or both. An individual who fails to show good cause for such failure, or who without good cause fails to appear pursuant to a Court order, may be punished by a fine of not more than $300, by imprisonment for not more than seven days, or both.

"(d) An individual who intentionally misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be punished by a fine of not more than $300, by imprisonment for not more than 90 days, or both.

"§11-1907. Summoning of Prospective Jurors.

"(a) At such times as are determined under the jury system plan, the Court shall summon or cause to be summoned from among qualified individuals under section 11-1906 sufficient prospective jurors to fulfill requirements for petit and grand jurors for the Court. A summons shall require a prospective juror to report for possible jury service at a specified time and place unless advised otherwise by the Court. Service of prospective jurors may be made personally or by first-class, registered, or certified mail as determined under the plan.

"(b) A prospective juror who fails to appear for jury duty may be ordered by the Court to appear and show cause why he or she should not be held in contempt for such failure to appear. A prospective juror who fails to show good cause for such failure, or who without good cause fails to appear pursuant to a Court order, may be punished by a fine of not more than $300, by imprisonment for not more than seven days, or both.

"§11-1908. Exclusion from jury service.

"(a) Subject to the provisions of this section and of sections 11-1903, 11-1906, and 11-1909, no individual or class of individuals may be disqualified, excluded, excused, or exempt from service as a juror.

"(b) An individual summoned for jury service may be: (1) excluded by the Court on the ground that that individual

may be unable to render impartial jury service or that his or her service as a juror would be likely to disrupt the proceedings; (2) excluded upon peremptory challenge as provided by law; (3) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown; or (4) excluded upon determination by the Court that his or her service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (4) of this subsection unless the judge, in open Court, determines that such exclusion is warranted and that exclusion of that individual will not be inconsistent with sections 11-1901 and 11-1903 of this chapter.

"(c) An individual excluded from a jury shall be eligible to sit on another jury if the basis for the initial exclusion would not be relevant to his or her ability to serve on such other jury. The procedures for challenges to and review of exclusions from jury service shall be set forth in the jury system plan.

"§11-1909. Deferral from jury service.

"A qualified prospective juror may be deferred from jury service only upon a showing of undue hardship, extreme inconvenience, public necessity, or temporary physical or mental disability which would affect service as a juror. The procedure for requesting a deferral from jury service and the

procedure and basis for granting a deferral shall be set forth in the master jury plan.

"§11-1910. Challenging compliance with selection procedures.

"(a) A party may challenge the composition of a jury by a motion for appropriate relief. A challenge shall be brought and decided before any individual juror is examined, unless the Court orders otherwise. The motion shall be in writing, supported by affidavit, and shall specify the facts constituting the grounds for the challenge. If the Court so determines, the motion may be decided on the basis of the affidavits filed with the challenge. If the Court orders trial of the challenge, witnesses may be examined on oath by the Court and may be so examined by either party.

"(b) If the Court determines that in selecting a grand or petit jury there has been a substantial failure to comply with this chapter, the Court shall stay the proceedings pending the selection of a jury in conformity with this chapter, quash the indictment, or grant other appropriate relief.

"(c) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the District of Columbia, the United States, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this chapter. Nothing in this section shall preclude any person from pursuing any other

remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin, economic status, marital status, age, or physical handicap in the selection of individuals for service on grand or petit juries.

"§11-1911. Length of service.

"The length of service for grand and petit jurors shall be determined by the master jury plan. In any twenty-four month period an individual shall not be required to serve more than once as a grand or petit juror except as may be necessary by reason of the insufficiency of the master juror list or as ordered by the Court.

"§11-1912. Juror fees.

"(a) Notwithstanding section 602(a) of the District of Columbia Self-Government and Governmental Reorganization Act, grand and petit jurors serving in the Superior Court shall receive fees and expenses at rates established by the Council of the District of Columbia, except that such fees and expenses may not exceed the respective rates paid to such jurors in the federal system.

"(b) A petit or grand juror receiving benefits under the laws of employment security of the District of Columbia shall not lose such benefits on account of performance of juror service.

"(c) Employees of the United States or of any State or local government who serve as grand or petit jurors and who continue to receive regular compensation during the period of jury service shall not be compensated for jury service. Amounts representing reimbursement of expenses incurred in connection with jury service may be paid to such employees to the extent provided in the jury system plan.

"§11-1913. Protection of employment of jurors.

"(a) An employer shall not deprive an employee of employment, threaten, or otherwise coerce an employee with respect to employment because the employee receives a summons, responds to a summons, serves as a juror, or attends Court for prospective jury service.

"(b) An employer who violates subsection (a) is guilty of criminal contempt. Upon a finding of criminal contempt an employer may be fined not more than $300, imprisoned for not more than 30 days, or both, for a first offense, and may be fined not more than $5,000, imprisoned for not more than 180 days, or both, for any subsequent offense.

"(c) If an employer discharges an employee in violation of subsection (a), the employee within 9 months of such discharge may bring a civil action for recovery of wages lost as a result of the violation, for an order of reinstatement of employment, and for damages. If an employee prevails in an

action under this subsection, that employee shall be entitled to reasonable attorney fees fixed by the court.

"§11-1914. Preservation of records.

"(a) All records and lists compiled and maintained in connection with the selection and service of jurors shall be preserved for the length of time specified in the jury system plan.

"(b) The contents of any records or lists used in connection with the selection process shall not be disclosed, except in connection with the preparation or presentation of a motion under §11-1910, or until all individuals selected to serve as grand or petit jurors from such lists have been discharged.

"§11-1915. Fraud in the selection process.

"An individual who commits fraud in the processing or selection of jurors or prospective jurors, either by causing any name to be inserted into any list maliciously or by causing any name to be deleted from any list maliciously (including malicious data entry or the altering of any data processing machine or any set of instructions or programs which control data processing equipment for such malicious purpose), is guilty of the crime of jury tampering, and, upon conviction, may be punished by a fine of not more than $10,000, imprisonment for not more than two years, or both. This section

shall not limit any other provisions of law concerning the crime of jury tampering.

"§11-1916. Grand jury; additional grand jury.

"(a) A grand jury serving in the District of Columbia may take cognizance of all matters brought before it regardless of whether an indictment is returnable in the Federal or District of Columbia courts.

"(b) If the United States Attorney for the District of Columbia certifies in writing to the chief judge that an additional grand jury is required, the judge may in his or her discretion order an additional grand jury summoned which shall be drawn at such time as he or she designates. Unless discharged by order of the judge, the additional grand jury shall serve until the end of the term for which it is drawn.

"§11-1917. Coordination and Cooperation of Courts.

"To the extent feasible, the Superior Court and the United States District Court shall consider the respective needs of each court in the qualification, selection, and service of jurors. Nothing in this chapter shall be construed to prevent such courts from entering into any agreement for sharing resources and facilities (including automated data processing hardware and software, forms, postage, and other resources).

"§11-1018. Effect of Invalidity.

"If any provision of this Act or the application of that provision is held invalid, such invalidity shall not affect any other provision or application of this Act which can be given effect without the invalid provision or application.".

SEC. 3. TECHNICAL AND CONFORMING AMENDMENTS.

Section 1869(f) of title 28, United States Code, is amended by striking out "except that for purposes of sections 1861, 1862, 1866(c), 1866(d), and 1867 of this chapter such terms shall include the Superior Court of the District of Columbia".

SEC. 4. EFFECTIVE DATE.

(a) Except as provided in subsection (b), the provisions of this Act shall take effect 180 days after the date of enactment of this Act.

(b) Upon enactment of this Act, the Board of Judges shall have authority to promulgate and adopt a jury system plan in accordance with this Act and the Court and the clerk of the Court shall have authority to take all necessary actions

preliminary to the assumption of the administration of an independent jury system under this Act.

Passed the House of Representatives October 28, 1985.

Attest: BENJAMIN J. GUTHRIE,

Clerk.

II

99TH CONGRESS
1ST SESSION

H. R. 3578

IN THE SENATE OF THE UNITED STATES

OCTOBER 29 (legislative day, OCTOBER 28), 1985
Received; read twice and referred to the Committee on Governmental Affairs

AN ACT

To provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Judicial Efficiency and Improvement Act of 1985".

SEC. 2. ANNUAL REPORT ON PROSECUTIONS.

Not later than March 1 of each year, the United States attorney for the District of Columbia shall compile and make available an annual report concerning prosecutions, under the

laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia, conducted by the Office of the United States attorney for the District of Columbia in the previous calendar year. Such report shall include the number of prosecutions and convictions by category and nature of offense, and shall include any recommendations concerning the criminal justice system in the District of Columbia.

SEC. 3. HEARING COMMISSIONERS.

Section 11–1732 of title 11 of the District of Columbia Code is amended to read as follows:

"§ 11–1732. Hearing commissioners.

"(a) The chief judge of the Superior Court may appoint and remove hearing commissioners who shall serve in the Superior Court and perform the duties enumerated in subsection (c) of this section and such other duties as are consistent with the Constitution and laws of the United States and of the District of Columbia and are assigned by rule of the Superior Court.

"(b) No individual may be appointed or serve as a hearing commissioner under this section unless such individual has been a member of the bar of the District of Columbia for at least three years.

"(c) A hearing commissioner, when specifically designated by the chief judge of the Superior Court, may perform the following functions:

"(1) Administer oaths and affirmations and take acknowledgments.

"(2) Determine conditions of release and pretrial detention pursuant to the provisions of title 23 of the District of Columbia Code (relating to criminal procedures).

"(3) Conduct preliminary examinations in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it.

"(4) Subject to the provisions of subsection (d), with the consent of the parties involved, make findings in uncontested proceedings, and in contested hearings in the civil, criminal, and family divisions of the Superior Court.

"(d)(1) With respect to proceedings and hearings under subsection (c)(4), a rehearing of the case, or a review of the hearing commissioner's findings, may be made by a judge of the appropriate division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed within ten days after the judgment. An appeal to the District

of Columbia Court of Appeals may be made only after a review hearing is held in the Superior Court.

"(2)(A) In any case brought under sections 11–1101 (1), (3), (10), or (11) involving the establishment or enforcement of child support, or in any case seeking to modify an existing child support order, where a hearing commissioner in the Family Division of the Superior Court finds that there is an existing duty of support, the hearing commissioner shall conduct a hearing on support, make findings, and enter judgment.

"(B) If in a case under subparagraph (A), the hearing commissioner finds that a duty of support exists and makes a finding that the case involves complex issues requiring judicial resolution, the hearing commissioner shall establish a temporary support obligation and refer unresolved issues to a judge.

"(C) In cases under subparagraphs (A) and (B) in which the hearing commissioner finds that there is a duty of support and the individual owing that duty has been served or given notice of the proceedings under any applicable statute or court rule, if that individual fails to appear or otherwise respond, the hearing commissioner shall enter a default order.

"(D)(1) Subject to paragraph (2), the findings of the hearing commissioner shall constitute a final order of the Superior Court.

"(2) A rehearing or review of the hearing commissioner's findings in a case under subparagraphs (A) and (B) may be made by a judge of the Family Division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed within ten days after the judgment. An appeal to the District of Columbia Court of Appeals may be made only after a review hearing is held in the Superior Court.".

SEC. 4. APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS.

Section 11-1703 of title 11 of the District of Columbia Code is amended—

(1) by striking out subsection (b);

(2) by redesignating subsection (c) as subsection (d); and

(3) by inserting after subsection (a) the following new subsections:

"(b) The Executive Officer shall be appointed, and subject to removal, by the Joint Committee on Judicial Administration with the approval of the chief judges of the District of Columbia courts. In making such appointment the Joint Committee shall consider experience and special training in administrative and executive positions and familiarity with court procedures.

"(c) The Executive Officer shall be a bona fide resident of the District of Columbia or become a resident not more than 180 days after the date of appointment.".

SEC. 5. MANDATORY RETIREMENT AGE OF JUDGES.

Section 431(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out "seventy" and inserting in lieu thereof "seventy-four".

SEC. 6. APPOINTMENT PANEL FOR THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE.

(a) COMPOSITION OF APPOINTMENT PANEL.—Section 303 of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D.C. Code, 1-2703) is amended in subsection (b)(1)—

(1) by striking out subparagraph (A); and

(2) by redesignating subparagraphs (B), (C), (D), and (E) as subparagraphs (A), (B), (C), and (D), respectively.

(b) PRESIDING OFFICER.—Section 303 of such Act (D.C. Code, 1-2703) is further amended in subsection (b)(1) by striking out "chief judge of the United States Court of Appeals for the District of Columbia Circuit" and inserting in lieu thereof "chief judge of the District of Columbia Court of Appeals".

SEC. 7. REORGANIZATION OF AUDIT RESPONSIBILITY.

(a) AUDITOR-MASTER.—Section 11–1724 of title 11 of the District of Columbia Code is amended—

(1) by striking out "(1) audit and state fiduciary accounts,"; and

(2) by respectively designating clauses (2) and (3) as clauses "(1)" and "(2)".

(b) REGISTER OF WILLS.—Section 11–2104(a) of title 11 of the District of Columbia Code is amended—

(1) in paragraph (2) by striking out "and" after the semicolon;

(2) in paragraph (3) by striking out the period and inserting in lieu thereof "; and"; and

(3) by inserting at the end thereof the following new paragraph:

"(4) audit and state fiduciary accounts.".

SEC. 8. ELIMINATION OF DUPLICATE JUDICIAL FINANCIAL REPORTING REQUIREMENT.

(a) TERMINATION OF FEDERAL DISCLOSURE REQUIREMENTS.—Section 301 of the Ethics in Government Act of 1978 (28 U.S.C. App. 301) is amended by inserting at the end thereof the following new subsection:

"(h) The provisions of this Act shall not apply to any judicial officer or employee of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 308(9) of such Act (28 U.S.C. App. 308(9)) is amended by striking out "courts of the District of Columbia".

SEC. 9. CERTIFICATION OF QUESTIONS OF LAW.

(a) IN GENERAL.—Subchapter II of chapter 7, title 11, District of Columbia Code, is amended by inserting after section 11–722 the following new section:

"§ Sec. 11–723. Certification of Questions of Law.

"(a) The District of Columbia Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if there are involved in any proceeding before any such certifying court questions of law of the District of Columbia which may be determinative of the cause pending in such certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals.

"(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon the court's motion or upon motion of any party to the cause.

"(c) A certification order shall set forth (1) the question of law to be answered; and (2) a statement of all facts relevant to the questions certified and the nature of the controversy in which the questions arose.

"(d) A certification order shall be prepared by the certifying court and forwarded to the District of Columbia Court of Appeals. The District of Columbia Court of Appeals may require the original or copies of all or such portion of the record before the certifying court as are considered necessary to a determination of the questions certified to it.

"(e) Fees and costs shall be the same as in appeals docketed before the District of Columbia Court of Appeals and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

"(f) The District of Columbia Court of Appeals may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

"(g) The written opinion of the District of Columbia Court of Appeals stating the law governing any questions certified under subsection (a) shall be sent by the clerk to the certifying court and to the parties.

"(h)(1) The District of Columbia Court of Appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any State under the conditions described in subsection (a).

"(2) The procedures for certification from the District of Columbia to a State shall be those provided in the laws of that State.".

(b) TECHNICAL AMENDMENT.—The table of sections for such subchapter is amended by adding at the end thereof the following new item:

"11-723. Certification of questions of law.".

SEC. 10. PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION.

Section 434(c)(3) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out the last sentence and inserting in lieu thereof: "Information, records, and other materials furnished to or developed by the Commission in the performance of its duties under this section shall be privileged and confidential. Section 552 of title 5, United States Code, (known as the Freedom of Information Act) shall not apply to any such materials.".

SEC. 11. MEETINGS OF THE JUDICIAL NOMINATION COMMISSION.

Section 434(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by inserting at the end thereof "Meetings of the Commission may be closed to the public. Section 742 of this Act shall not apply to meetings of the Commission.".

SEC. 12. PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS.

Section 434(d) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by inserting at the end thereof the following new paragraph:

"(4) Upon submission to the President, the name of any individual recommended under this subsection shall be made public by the Judicial Nomination Commission.".

SEC. 13. DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION.

Section 11–1528 of title 11, District of Columbia Code, is amended by striking out all of subsection (a) and inserting in lieu thereof the following:

"(a)(1) Subject to paragraph (2), the filing of papers with, and the giving of testimony before, the Commission shall be privileged. Subject to paragraph (2), hearings before the Commission, the record thereof, and materials and papers filed in connection with such hearings shall be confidential.

"(2)(A) The judge whose conduct or health is the subject of any proceedings under this subchapter may disclose or authorize the disclosure of any information under paragraph (1).

"(B) With respect to a prosecution of a witness for perjury or on review of a decision of the Commission, the record of hearings before the Commission and all papers filed in connection with such hearing shall be disclosed to the extent required for such prosecution or review.

"(C) Upon request, the Commission shall disclose, on a privileged and confidential basis, to the District of Columbia Judicial Nomination Commission any information under paragraph (1) concerning any judge being considered by such

nomination commission for elevation to the District of Columbia Court of Appeals or for chief judge of a District of Columbia court.".

SEC. 14. REAPPOINTMENT TO JUDICIAL OFFICE.

Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended—

(1) in the first sentence by striking out "three months" and inserting in lieu thereof "six months"; and

(2) in the third sentence, by striking out "thirty" and inserting in lieu thereof "sixty".

SEC. 15. MODIFICATION OF JUDICIAL REAPPOINTMENT EVALUATION CATEGORIES.

Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended in the fourth sentence by striking out "exceptionally well-qualified or".

SEC. 16. SERVICES OF RETIRED JUDGES.

Section 11–1504(a) of title 11, District of Columbia Code, is amended by striking out paragraphs (2) and (3) and inserting after paragraph (1) the following new paragraph:

"(2) At any time prior to or after retirement, a judge may request recommendation from the District of Columbia Commission on Judicial Disabilities and Tenure (hereinafter

in this section referred to as the 'Commission') to be appointed as a senior judge in accordance with this section.".

SEC. 17. EXTENSION OF PERIOD FOR SUBMITTING JUDICIAL NOMINATIONS.

Section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out "thirty days" each place it appears and inserting in lieu thereof "sixty days".

SEC. 18. EFFECTIVE DATE.

This Act shall take effect on the date of the enactment of this Act.

Passed the House of Representatives October 28, 1985.

Attest: BENJAMIN J. GUTHRIE,

Clerk.

PUBLIC DEFENDER SERVICE

FOR THE DISTRICT OF COLUMBIA

451 INDIANA AVENUE, N.W.
WASHINGTON, D.C. 20001

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January 6, 1986

Honorable Charles McC Mathias, Jr.
Chairman, Subcommittee on Governmental Efficiency
and the District of Columbia
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Re: H.R. 3578

Dear Senator Mathias:

The Board of Trustees of the Public Defender Service has authorized me to communicate to you the Board's official position on Bill H.R. 3578, which is under consideration by your Subcommittee. One section of this proposed legislation provides for a major change in the composition of the appointment panel for the Board of Trustees of the Public Defender Service. In essence, this Bill would eliminate one of the two federal Chief Judges from the appointment panel.

It is the position of the Board of Trustees that both federal Chief Judges should remain on the appointment panel. The Board's view is based upon three primary considerations. First, in performing the duty of selecting attorney members of the Board, the Trustees believe that federal judges are exposed to a broader range of members of the bar beyond merely those attorneys who practice in the local court system. Therefore, their knowledge of attorneys who practice in the federal court system serves to enhance substantially the pool of potential Board appointees. Second, members of the Board of Trustees have determined, as individuals, that they have received valuable insights into the mission of the agency from their discussions with both the local Chief Judges and the federal Chief Judges during interviews within the selection process.

Above and beyond the issues noted above, the Board of Trustees is strongly of the opinion that no legislative

action should be taken which might serve to diminish the independence of this agency. The Public Defender Service of the District of Columbia has never operated under the control of the central government of the District of Columbia. When the agency was first established, before the advent of home rule, the Public Defender Service provided representation to many clients in felony cases before the United States District Court for the District of Columbia. While most of its clients today are people who are prosecuted in the Superior Court of the District of Columbia, the agency does continue to perform representation in the United States District Court. Because of recent trends in prosecution practices and because the Court of Appeals for the District of Columbia Circuit still relies upon this agency's contributions in amicus curiae briefs, the Public Defender Service expects to increase its federal presence gradually in the future.

For these reasons, the Board of Trustees of the Public Defender Service urges the Subcommittee to reject the concept of eliminating the two federal Chief Judges from the appointment panel and to delete this passage from the Bill.

Yours truly,

Cheryl M. Long

Cheryl M. Long
Director

cc: Eileen Mayer, Esq.
Chief Counsel
Subcommittee on Governmental Efficiency
and the District of Columbia
United States Senate
442 Hart Building
Washington, D. C. 20510

The Greater Washington Board of Trade
Linking Business and Community in The District of Columbia, Northern Virginia and Suburban Maryland

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March 4, 1986

The Honorable Charles McC. Mathias, Chairman
Subcommittee on Governmental Efficiency
& the District of Columbia
United States Senate
Russell Senate Office Bldg., Room 387
Washington, DC 20510

Dear Senator Mathias:

On behalf of the 1,400 corporate members of The Greater Washington Board of Trade I am pleased to express strong support for H.R. 2946, to create an independent jury system for the District of Columbia Superior Court and, in turn, allow for the establishment of the one trial or one day jury duty term. This initiative has broad support from our membership throughout the greater Washington area within which Montgomery County, Maryland, has been a model for the one trial or one day jury duty term.

Implementation of the one trial or one day jury duty term will:

-- eliminate the present burdens and considerable inconvenience citizens and businesses now experience in the two week jury term;

-- increase the total number of citizens called for jury duty, in turn providing increased understanding and respect of the court system;

-- virtually eliminate the need some employers have for seeking employee exemptions because it will reduce time away from work;

-- increase the representativeness of the jury pool by eliminating most statutory exemptions; and,

-- improve the flexibility and responsiveness of the jury system to changes in the operation of the Court.

The initiative and leadership of the D.C. Superior Court, and your leadership in enacting this enabling legislation, will materially increase the number of citizens serving on jury duty each year. By distributing this vital civic responsibility across the entire community, and shortening the term to one trial or one day, the adverse impact on individual citizens and businesses will be eliminated.

Sincerely,

Duane B. Adams

Duane B. Adams, Chairman
Public Protection Committee

Chairman & Chief Executive Officer
The Acacia Group

COMMON CAUSE
DISTRICT OF COLUMBIA

P.O. Box 19250 Washington, D.C. 20036-0250 (202) 833-1200

STATEMENT OF KURT VORNDRAN, EXECUTIVE DIRECTOR OF COMMON CAUSE/DC
ON BILL H.R. 2946

Common Cause is the Subcommittee on Government Efficiency and the District of Columbia on the matter of H.R. 2946.

Common Cause is in strong support of H.R. 2946. We feel the establishment of an independent jury system for the Superior Court of the District of Columbia would be a positive step towards full home rule for the District. The municipal courts of the District of Columbia should not be a federal fiefdom. While Common Cause looks forward to the day when the people of the District of Columbia can select their own municipal judges, a separate track for juror selection is a first step in that direction.

In addition, as an organization concerned about citizen participation in government, we endorse the one day/one trial method of jury service. One day/one trial has the beneficial effect of involving more citizens in this most important function of a free society while making jury duty less of a burden for citizens and employers.

This legislation has strong support from the people of the District of Columbia. Our elected leaders have all supported H.R. 2946 and we have received a very positive response from many of the 3,000 Common Cause members in the District of Columbia.

Draft of Remarks Prepared for Delivery by Wiley A. Branton on H.R. 3370 Before the Subcommittee on Judiciary and Education of the Committee on the District of Columbia, October 1, 1985. (The Honorable Mervyn M. Dymally, M.C.)

Mr. Chairman and members of the Committee. My name is Wiley A. Branton, a resident of 1611 Tamarack Street, N.W., Washington, D.C. 20012. I am currently a partner in the law firm of Sidley & Austin with offices at 1722 Eye Street, N.W., in the District of Columbia. I have been a member of the bar for more than 33 years and have resided in the District of Columbia for the past 20 years. I currently serve as a member and Chairman of the District of Columbia Judicial Nomination Commission. I was appointed to the Commission by The Honorable Marion S. Barry, Jr., as one of the Mayor's two appointees to the seven-member Commission. I wish to address my remarks to certain provisions of H.R. 3370 and the views expressed here are my personal views and no official position has been taken on the matters, except where otherwise noted, by the Judicial Nomination Commission.

Sec. 6. MANDATORY RETIREMENT AGE OF JUDGES

I fully support the raising of the mandatory retirement age for judges in the District of Columbia courts from age 70 to age 74. This change has already been enacted into law, but it is my understanding that

Section 6 is being offered so as to conform the D.C. Code with the District of Columbia Self-Government and Governmental Reorganization Act.

Sec. 11. PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION

The very nature of judicial appointments requires the utmost confidentiality and persons who submit information to the Judicial Nomination Commission should have the confidence of knowing that the information can be retained by the Commission as privileged and confidential information and that it will not be subject to release under any provision of the Freedom of Information Act, or by any other procedure. Lawyers, judges and the general public would be very hesitant about making comments that might reflect adversely on the character or fitness of persons under consideration for judicial appointment unless they are assured that their remarks or comments will be protected as is intended by the proposed language in Section 11.

Sec. 12. MEETINGS OF THE JUDICIAL NOMINATION COMMISSION

As a general rule, meetings of the Commission should be closed to the public because of the sensitive issues of character and fitness of potential judicial nominees that generally form the subject matter of most meetings. The same protection that is afforded by the preceding section is equally as important to the meetings of the Commission.

Sec. 13. PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS

Not only do I personally favor the enactment of Section 13, but this subject matter has the approval of the members of the Judicial Nomination Commission who have had occasion to discuss the desirability of releasing to the public the names of individuals recommended by the Commission to the President of the United States for his consideration in selecting nominees for appointment to the District of Columbia courts. Invariably, the names leak out and on occasion some erroneous information concerning certain names has been published. Such errors could be avoided by the official release by the Commission of the names of individuals being recommended to the President, but only after the names have been submitted to the White House. In my opinion, the public release of the names alerts the public to the identification of potential judicial nominees and will provide an opportunity for information to be made available to the White House by persons who were unaware that certain individuals were being considered for judicial appointment. There is every reason to believe that most of the remarks and information coming to the White House as a result of the public disclosure of the names of the persons being recommended for possible juducial appointment would be of a complimentary

nature. It is also quite possible that individuals will come forward with information reflecting undesirable character traits of such a magnitude as to not only alert the White House that the President should not select a particular person who has been recommended, but which would have caused the Commission to not recommend the person in the first instance if it had been privy to the information.

Sec. 14. DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION

Once a person has been appointed and confirmed as a judge in the District of Columbia court system, the Commission on Judicial Nominations has no further responsibility as to the actual performance of those judges during the terms of their respective appointments. A different agency, the District of Columbia Commission on Judicial Disabilities and Tenure, is the agency that has the responsibility for monitoring the conduct of judges. The latter Commission has the power to suspend, retire or remove a judge of a District of Columbia court, and is also the agency charged with the responsibility for recommending, for or against, the reappointment of judges whose terms are expiring.

There are occasions when information in the possession of the Commission on Judicial Disabilities and Tenture may be needed by the Judicial Nomination Commission,

and such information could be very vital in certain decisions that must be made by the Judicial Nomination Commission in two situations. One such situation has to do with the fact that the Judicial Nomination Commission has the responsibility for the actual appointment of the Chief Judge for both the Superior Court as well as the District of Columbia Court of Appeals. It would be ludicrous if the Judicial Nominations Commission should appoint any judge to the position of Chief Judge at a time when the Commission on Judicial Disabilities and Tenure had information which would dictate that the person probably should not be appointed Chief Judge if said information was known to the Judicial Nomination Commission. Information would only be sought by the Judicial Nomination Commission from the Commission on Judicial Disabilities and Tenure regarding those judges who are actually under consideration for possible appointment as Chief Judge, and the information would remain confidential with the Judicial Nomination Commission.

The other instance where information held by the Commission on Judicial Disabilities and Tenure could be of value to the Judicial Nomination Commission would be in those instances where a judge on the Superior Court is being considered by the Judicial Nomination Commission for possible recommendation to the President to fill a vacancy on the District of Columbia Court of Appeals.

Respectfully submitted,

Wiley A. Branton, Chairman
District of Columbia Judicial
Nomination Commission